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EMPLOYERS' LIABILITY
AND
COMPENSATION TO WORKMEN
IN
THE UNITED STATES
BY
J. PEARCE HIGGINSON

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EMPLOYERS' LIABILITY^c

AND

COMPENSATION TO WORKMEN

ON

THE CONTINENT.

BY

Alexander
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SOMETIME SCHOLAR OF DOWNING COLLEGE, CAMBRIDGE; LECTURER IN LAW
IN THE UNIVERSITY OF CAMBRIDGE.

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EMPLOYERS' LIABILITY ON THE CONTINENT.

INTRODUCTION.

THERE are many causes which render the present a favourable moment for investigating a doctrine which at first sight seems to conflict with a fundamental principle of law, namely, that the individual is only liable for his own acts; and for examining the foundations of the wide-spread liability which exists in all European countries, of masters for wrongs committed by their servants. Trades unions have in recent years largely increased both in numbers and power; Germany and Austria have both recently passed laws for insurance against accidents caused to workmen in trade; the passing of the Workmen's Compensation Act of 1897, has given the subject a special interest to English-speaking people; in German-speaking countries discussion of the principles underlying the liability of masters for the wrongs of their servants is still vigorously carried on, and the new German Code, whilst settling the question for Germany, still leaves the subject of great importance to Austria. France appears to be on the eve of insurance legislation.

The subject will be treated under two main heads, viz. :—

- (1.) Injuries committed by servants to persons not in the same employ as themselves.
- (2.) Injuries committed by servants to fellow-servants, or employers' liability commonly so called.

Under the first head the development of the law in German-speaking countries and countries governed by the Code Civil will be discussed; under the second head a more general view of the position on the Continent will be taken.

A large part of the following essay has already appeared in the *Juridical Review*, and the Author desires to thank the Editor for several valuable suggestions. He also desires to acknowledge his obligations to Dr. Stocquart, of Brussels; Dr. Steinbach, of Vienna; Professor Beaune, of Lyons; and Mr. W. W. Buckland, Fellow of Gonville and Caius College, Cambridge.

DOWNING COLLEGE,
CAMBRIDGE, *July*, 1898.

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Part I.

CHAPTER I.

GERMANY AND AUSTRIA.

THE laws in Germany and Austria will be discussed together as they are based on similar grounds, and though in Germany the new Imperial Code has now made an important alteration as regards the presumption of blame, it will be necessary to consider the law hitherto prevailing, in order that the reason for this change may be better appreciated. The Imperial railway laws and laws relating to great undertakings differ slightly in detail in the two Empires, but in principle they both proceed on the same lines.

In early systems of law, both the Mosaic and the Roman, the principle of *noxæ deditio* appears. The head of the family has to answer for the acts of his establishment, whether human or not, and quite apart from any subjective blame on his part. The principle of making compensation by *actio noxalis* instead of handing over the offending person or thing is a later stage in the development of law. The master has to answer for the acts of all comprising his *familia*, first by handing over the wrong-doer, then by making compensation in lieu of surrender. Brunner, writing of the earliest stages of German law, says hereon: "Those belonging to the house, the wife, children, and menials are in the power of the head of the house. The position of the house-master shows itself within as control, without as

responsibility. If anyone belonging to the house has been injured, the master brings the action in his own name; whilst, on the other hand, he has to answer for all injuries imputed to his family by third persons, so that they, appearing to outsiders mainly as *pars domus*, become entirely protected through the person of the *paterfamilias*.”(a)

“According to Germanic law, as above remarked, the house-master was responsible to third persons for those attached to his house. This responsibility extended not merely to bondsmen, but also to half-free or free persons. If a free but landless man remained for some time in the house of another, he acquired a relation of dependency which established the responsibility of the house-master. . . . The liability of the master extended not merely over bondsmen living in the house, but over those settled on the land, and even over those elsewhere, so long as the master kept his ownership, and no third person became responsible by receiving the man. . . . For misdeeds of the bondsman, the master originally bore full responsibility towards third persons.”(b)

English mediæval law appears to have been but little different from that of Germany. The picture drawn by Brunner is very similar to that drawn by Professor Maitland. “The householder of Bracton’s day was bound to produce any member of his mainpast or household who was accused of felony, and failing to do so was amerced, but only amerced.”(c) And just as the germ of the modern responsibility of the master and employer in Germany is probably to be sought in the power of control exercised by the head of the household, so in England it is suggested that it may also spring from this source. (“A more hopeful line of tradition may lie within the household,” *op. cit. eod. loc.*)

It will be necessary, therefore, to examine the question historically.

(a) Brunner, “Deutsche Rechtsgeschichte,” i. sec. 12, pp. 70, 71.

(b) Brunner, D.R., ii. sec. 93.

(c) “History of English Law,” vol. ii. p. 523.

Until the middle of the fourteenth century Germany could not be said to have any Common Law. The law prevailing in different parts was from the twelfth century becoming written, but the influence of Roman law proved too much for these scattered customs, and they ultimately succumbed to it. These Folk laws have, for the most part, been edited in recent years, and the subject of the master's liability for his servant's acts finds a place in a large number of them. They exhibit a great diversity and a great difference of treatment of the cases according as the injury is done by a bond-servant, or a free servant. All early Folk laws appear to recognise the general principle that each man must answer for his own wrongs, though they nearly all find it necessary to depart from this principle in special cases and to recognise individual exceptions. The statement of Brunner is certainly generally true as regards injuries committed by slaves, and in the earliest stages possibly for all persons forming one family, whether bond or free. The slave is bound to his master by special ties, and for him he must answer. It appears that the master was looked upon as a connecting link between his slave and the nation, and just as he sued in his own name for any wrong that had been done to his slave, so he was held responsible for any injury committed by him; the reason given being that sufficient care had not been taken to prevent him from doing wrong. For example, in the *Lex Baiuvariorum*, ii. 5, we find "*quia servo non contestaverit, ut talia non faceret*," and viii. 2, "*pro eo quod servo suo disciplinam minime imposuit*." The slave either had to be punished or compensation granted by the owner, or in many cases both were bound (*cf.* Stobbe, "*Privatrecht*," vol. iii. pp. 388, 389). It was not enough in many cases that the slave had been killed, the master was still liable for compensation (Stobbe, iii. 387). Where the slave was shown to be acting under his master's orders, the latter was bound, and the former was regarded as his tool (*Lex Frisionum*, i. 14; *Lex Saxonum*, 50; *Lex Langobardorum*, ed. Roth. 241).

A reason for the liability which probably plays as large a part to-day as ever as a justification for the master's liability, is found in these early laws—viz., the fact that the slave could not pay for the damage he had done, and so these laws gave compensation to the full extent—e.g., *Omne damnum, quod servus fecerit, dominus emendet* (Lex Angliorum et Werinorum, 249); and the Lex Burgundiorum (iv. 2): and Baiuvariorum (i. 6), contain similar statements.

The Lex Salica (xxxv. 5) clearly recognises the principle of *noxæ deditio* by providing that where the master delivered up his slave, the compensation awarded by the judge should be reduced by one-half, whilst in other laws the master freed himself from liability by such surrender (L. Baiuw., viii. 9; L. Sax. 18), but he could not exonerate himself by freeing the slave.

Some Folk laws—e.g., Lex Saxonum,—freed the master from the consequence of the wrong, if the slave ran away and the master could get twelve oath helpers (*Eideshelfern*) to swear that he was ignorant of the delict of his servant (Lex Saxonum, 52), (see "*Die Grundsätze über den Schadenersatz in Volksrechten*;" A. B. Schmidt, pp. 42–48).

These early sources are concerned chiefly, if not solely, with the question of injuries committed by slaves, and either because the wrong-doer has evaded punishment by flight, or because he is not in a position to pay, the injured party turns to his master (Schmidt, p. 42).

With the decrease of slavery and the consequent increase of free service, we find a change in the laws. In many of them the master is not answerable beyond the wages due at the date of the injury; in some, and those under the growing influence of Roman law, there was a wider liability answering more nearly to that of the liability for the slave.

According to the Sachsenspiegel and other Folk laws connected with it, the master was not liable for the wrongs done by his free servants. "*Nieman n'est plichtich von sinen Knecht to antwerdene vorbat, wen alse sin lon geweret,*

he ne werde sin bürge" (Sachsp. ii. 32). The master only has to answer the claim of the injured person so far as he has goods of the wrong-doer in his possession, or to deliver over to him any wages due. In another of the laws of the period it is stated that the master is liable if he keep the servant for a day after he knows of the wrong having been done (Wendisch, "*Rügianischer landgebrarch von v. Norman*," pp. 216, 217). Of course, if the master commanded the wrong he appears as the actual wrong-doer here as in times of slavery, and in the *Sachsenspiegel* and kindred laws, wrongs done by slaves and animals stand on the same footing ("*Die Lehre vom Schadenersatz nach dem Sachsenspiegel*," Otto Hammer, pp. 81-85). The *Sachsenspiegel* is the ground-work of numerous other authorities of the later part of the thirteenth century, and from many of these the same rule may be laid down as that already cited. So, for example, we find in the *Rechtsbrief für Pritzwalk* (1256), "*Si servus pro precio in servicio domini sui perdit vitam suam, dominus non tenetur, nisi ut persolvat precium ipsum*;" a similar rule is found in the *Hamburger Stadtrecht* of 1270.

If the master is careless in ordering or executing any work, or an injury is caused by his servants to third persons, he is then liable, "*wenn ihm eine 'vorsumlichkeit' zur last fällt*" (Hertz, p. 60).

In the *Schwabenspiegel* and other South-German authorities of the Middle Ages, there is a modification of the *Sachsenspiegel* which is clearly traceable to Roman influence. The master is liable for the acts of free servants as if slaves.(a)

These laws show the usual development.

There is, first, the time when the master answers absolutely for all his familia, all his domestics, free or unfree; then, as regards freemen he can relieve himself by handing them over to the Court, though, as regards slaves, the master pays the

(a) (See "*Die Rechtsverhältnisse des freien Gesindes nach dem deutschen Rechtsquellen der Mittelalters*," Gustave Hertz, pp. 59-63.)

compensation money; thirdly, the value of the surrendered slave can be set off, and, finally, complete exoneration is effected by surrender. In the last stage the master must sometimes swear ignorance of connivance at the wrongful deed—e.g., in an Edict of Chilpéric, we get "*Tunc dominus servi cum vi. [hominibus] juramento [affirmet] quod pura sit conscientia sua, nec suum consilium factum sit nec voluntatem ejus, et servum ipsum det ad vindictam*" (Edict Chilp. c. 5). (See Wigmore, "Responsibility for Tortious Acts;" *Harvard Law Review*, vol. vii. 331.)

An examination of the foregoing, and of the authorities cited by Drs. Hertz, Hammer, and Schmidt, leads us to conclude that the rule in the Middle Ages was far wider than that of the modern German laws, in that a master was absolutely bound to make compensation for the injuries committed by his slaves, though sometimes he could avoid the liability, in whole or in part, by surrender; that, as a rule, the free servant had to answer for his own wrongs in his own person, the master being only liable to the extent of wages due to, or goods belonging to the servant in his possession, though in some cases the master must dismiss him from his service if he would free himself (Hammer, p. 82). There appear to be a few cases where the master was liable for the free servant's wrongs, and, especially, in the case of injuries caused by fire. One of the chief reasons given in justification for the rule was that a remedy given against the servant was an illusory one, he had no property, he was bound to obey his master's commands, the master can punish any disobedience, and therefore he should be held liable (Hammer, pp. 84, 85). This was true as regards the slave, and it is to a large extent true to-day, but the rule of law of the Middle Ages only recognised in a limited number of cases any right of redress against the master for wrongful acts of free servants. The more the contractual relation of service took the place of the state of slavery, the smaller became the liability of the master. In addition to the liability of a master for his slave's acts, he was also responsible for any

injuries caused by a stranger whom he harboured (Stobbe, iii. 390).

In the domain of contract law, however, it was early recognised that whoever performs a contract by means of others must answer for their faults. There is no general principle expressed, but instances are given in different places—*e.g.*, the tailor is liable if cloth is purloined which has been handed to him to make up; the carrier is liable if his servant pilfers goods left with him, &c. And as in contract the *culpa* of the agent is that of the principal, so the *culpa* of the servant gets put down to the master.

This development is traceable distinctly to the influence of Roman law, the final reception of which dates from 1495. According to Roman law he was responsible who had actually caused the wrong, if he was to blame either because he had not exercised due care in the choice of his servants (*culpa in eligendo*), or if he failed to exercise due care in the supervision of his dependents, or was otherwise a partaker in their guilt. In certain cases the Roman law went even further than this. An absolute responsibility was laid on the ship-owners, inn-keepers and stable-keepers (*navitæ, caupones, and stabularii*) for *damnum* and *furtum* committed by their servants (Just. Inst. iv. tit. 5). The reasons given by the jurists are the "*improbilas hujus generis hominum*," the limited choice which the public has as regards such individuals, and the complete control which they exercised over goods committed to them for transport and safe custody (Dig. iv. 9. 1, 1, and iv. 9. 3, 1). In addition to these cases a Prætorian edict imposed an absolute responsibility on the *publicani* for all excesses committed by their assistants, the reason for such edict being given as from the nature of the case (D. xxxix. 4. 1, 2), and "*Quantæ audaciæ, quantæ temeritatis sint publicanorum factiones, nemo est qui nesciat; id circo Prætor ad compescendam eorum audaciam hoc Edictum proposuit*" (xxxix. 4, 12 pr.). Finally the liability of the master of the house for *dejecta et effusa* is imposed for the simple reason, "*publice enim utile*

est, sine metu et periculo per itinera commeari" (ix. 3. 1, 1).

Culpa in eligendo, culpa in custodiendo, the nature of the case, public utility, these are, in short, the reasons given for the different enactments, all of which had for their object the rendering liable of one person for acts of another free person in an absolute and irrebuttable manner.^(a)

The liability which arises under the *culpa in eligendo* theory may arise from one of two ways. (1) Where a person bound by contract to another makes use of an agent in executing it, and a damage is caused by him (contractual *culpa*); or (2) where some one in an employment other than the execution of a contract employs a servant who injures another person, and the master has to answer for it (*Aquilian culpa*). It is frequently extremely difficult to distinguish between these two forms of liability, to say whether the evil was caused in carrying out a contract, or whilst performing a service. Modern law has brought into line contractual and extra-contractual *culpa* (Stobbe, iii. 387).

An examination of the text of the Lex Aquilia and the commentaries thereon shows that in many cases the owners of mischievous slaves, whose masters knew or should have known of their carelessness in dealing with another's property, were held liable by direct action under the Lex Aquilia (ix. 2. 27, 11). The fragment referred to only deals with the relationship of master and slave, but the principle therein stated has been applied to cases of damage done by free servants. The master was therefore liable for damage caused by his servants or employés, if he knew or might have known of their unfitness by being sufficiently careful (Grueber, Lex Aquilia, 252; Wäntig, 35-37).

In Roman law it is said that if a man in executing a contract did so by his servant, it was then a question whether such representation was allowed by the terms of the

(a) Wäntig, "Über die Haftung für fremde unerlaubte Handlungen," pp. 51, 61; Steinbach, "Die Grundsätze des heutigen Rechtes," p. 43; Stobbe, "Handbuch des Deutschen Privatrechts," iii. p. 392.

contract; if a wrong was done by the servant and representation was not allowed, the master was absolutely liable; if allowed, he was only liable so far as he had made a bad choice (Windscheid, vol. ii. p. 508).

In other parts of the Digest the employer is declared to be liable for having made a bad choice as evinced *ex post facto* (iii. 5. 21, 3, "*sed etiam quod imprudenter eum elegeris*"; xiii. 6. 11, *qui non tam idoneum hominem elegerit*;" xix. 2. 60, 7). So also a farmer is liable for servants and people he has brought on his farm (*in inducendis*, xix. 2. 11, pr.), or for the manner in which he employs his servants (*i.e.*, for *culpa in custodiendo*, xix. 2. 41; Grueber, p. 91).

A similar case to that raised in ix. 2. 27, 11, was tried in 1661 in Saxony, and it was laid down that the master was liable for fire caused by his servant if he knew of his carelessness, and still kept him "*wenn der Hausherr seine Gesindes halber von den Nachbarn oder Andern gewarnt wäre und doch solches nicht abgeschafft hätte*" (Wäntig, 37; Stobbe, iii. 393).

The modern codification starts with the general principle that every man is responsible only for his own wrongful acts, or as the Austrian code has it, "For unlawful acts which are not one's own a man is not as a rule answerable" (Art. 1313). There must be some actual blame, some subjective liability, and so the two following Articles, 1314 and 1315, lay down an exception to Art. 1313, that if anyone engages a servant without a character, or knowingly keeps in his service persons who are dangerous by temperament or character, or gives shelter to a known criminal, he must make compensation for injuries caused by such persons, and further, he who knowingly employs a dangerous or incompetent person has to answer for any injuries he may inflict on third persons.

Connected with this is Art. 1161, which provides that only in the most urgent cases can a workman or foreman employ another to do work entrusted to himself, and in such cases he is liable for blame in the choice of such person.

Under this head is comprised every kind of blame which is known to the common law as *culpa in eligendo*.

The Prussian Landrecht of 1794 (i. 60-62) lays down rules similar to those which the Austrian Code subsequently adopted. It enunciates the principle that for injuries committed by domestic servants, and by fellow-workmen and apprentices, the master and employer is not as a rule liable (Allg. preuss. Landr. 1, Theil, 6 Titel, secs. 60, 65), but it recognises clearly the obligation to compensate arising from *culpa in eligendo* when it states that the master "answers for his domestics or servants when he is himself to blame, when knowing the incapacity or the negligence of his servant he nevertheless keeps him in his service to do work for which he knows he is incapable." It further enacts that where injuries are committed by idiots, lunatics, or children under seven, those who are responsible for taking care of them are liable, and that as soon as it is clear that an injury has been committed by his domestic servants, workmen or apprentices, or by any occupant of his house, and the master, employer, or landlord cannot ascertain the wrong-doer, an action lies against him (sec. 68).

The view of the German Codes is, therefore, that a person is not liable for the *culpa* of others, unless he himself is in *culpa* as having imperfectly chosen his servants and assistants. The plaintiff in an action therefore must prove the master's *culpa*.

The French Code (Article 1384) has adopted the wider principle, according to which it is contended that the master is answerable for his servants, as for his tools. The argument that he has been careful in the choice of his servants is irrelevant, as subsequent events have shown that he has neglected something either in choosing them or in conducting his business.

It will be shown that the drift of modern developments is in this direction.

All the cases cited from the Prætorian development of Roman law have found their way into modern German

law, except, of course, that of the *publicani*; but this position has only been reached gradually, and in modern times.

The liability of the owners of ships for injuries committed by the crew to third persons was laid down in the Commercial Code (Articles 451 and 452), re-enacting older legislation on the subject. All attempts, however, to extend the principles of absolute liability for servants to the cases of the carriage of goods or persons by land were unsuccessful until the growth of the railway monopoly rendered an interference with the Codes necessary in the defence of the enlarged interests of the public (Wäntig, p. 70).

The general principles of the common law were on the whole not sufficient; besides, in those parts of Germany where the French law prevailed, persons who meet with a railway accident, or in any way were injured by a servant, were in a much more favourable position than if the same had happened in another part of the country, as Article 1384 of the Code Civil was much wider than German law (Wäntig, p. 71).

The first step towards imposing a wider responsibility on railway companies was taken in Prussia by the passing of the Railway Law of 3rd November, 1838, which enacted in section 25 that the company should be liable to make compensation for all injuries which should happen in the carrying on the line of persons or goods as well as to any other persons or goods, and this liability could only be avoided by showing that the injury was caused through the fault of the injured person, or through an unavoidable external accident.

By this law railway companies became bound for delicts committed by their servants, even though such acts were done contrary to instructions. Not only were they liable to persons and things carried, but also to all persons and things suffering damage through the conduct of the railway. The Austrian law of 5th March, 1869 is on similar lines, but this law refers solely to bodily injury or death of

human beings caused by the conduct of a railway. Section 1 of this law provides that "if *anyone* is killed or injured through the carrying on a railway worked by steam-power, a *presumption of blame on the part of the undertaking or of the staff is raised*, and the *entrepreneur (Unternehmer)* is bound to compensate." The amendment of the law is on the lines of inversion of proof.

As regards the other States of the German Empire, they first obtained a general law on this subject by the passing of the Imperial Law of 7th June, 1871. Before this date endeavours had been made by the application of common law principles to impose an absolute liability on railway companies, as the following cases show.

The Court of Appeal of Munich on the 11th May, 1853, ("Seuffert Archiv.," x. 164) decided, in an action brought for the recovery of damages for fire caused by a spark from an engine through the carelessness of the driver, that a railway company is absolutely responsible for injuries caused by its employés, saying that the maxim, "*qui suo jure utitur neminem laedit*" has no application to such a case, for no owner of property may with immunity injure his neighbour, as the latter is equally entitled to the protection of the Court. In a subsequent case (16th April, 1861, "Seuffert Archiv.," xiv. 208), with similar facts, this decision was reviewed and affirmed, the Court basing its decision on the grounds of the Lex Aquilia. "The escape of sparks may clearly be an unlawful act," said the Court, "and if an invasion on the rights of another has been shown to be so caused and continued, a ground of action is shown." It is sufficient to show that the fire was started by the railway engine to at once raise a presumption of negligence. The Court of Appeal of Darmstadt (April, 1846, "Seuffert Archiv.," vii. 150), had already decided that the principles of the Lex Aquilia applied equally to juristic persons, for employés of such corporations were in the position of tools of the company.

The Imperial law of Germany of 7th June, 1871

(*Haftpflichtgesetz*) had a wider scope than either of the laws hitherto mentioned. The Austrian law was concerned only with death or bodily injury to human beings; the Prussian law extended also to injuries to goods; but the law of 7th June, 1871, refers not merely to railway accidents, but also to those accidents which happen in the execution of certain other works. It does not, however, lay down any broad general principles as the French law does; in fact, railways and the other industrial undertakings are dealt with in this law on different principles.

The steps which led to the passing of this law may be of interest, and will assist in a clearer understanding of its object.

The first attack on the prevailing view came from a petition of the Reichstag in 1868, and this in conjunction with serious accidents and other circumstances calling attention to the insufficiency of the existing law demanded a revision of the enactments relating to claims for compensation for accidental injury to private persons. As a result of this petition, the Judicial Committee of the Council of the Confederation presented a report requesting the Chancellor to prepare a draft law on the responsibility of entrepreneurs of railways, mines, and factories for the death and bodily injury caused in the carrying on of such undertakings. This draft was presented by the Prussian Minister of Commerce, and from the first was stamped with the character of a *lex specialis*. Notwithstanding many attacks within and without the legislature, the draft measure held its own, and all attempts to extend or limit the principles were frustrated, and the measure received the Imperial sanction on 7th June, 1871.

Under these circumstances the statements contained in the law are naturally construed strictly and applied only to the undertakings therein mentioned (*see* Wäntig, pp. 73, 74).

The memorial laid before the Reichstag with the draft contains the following reasons for limiting the law to the undertakings specified:—"Though it is the task of the Imperial

legislation with regard to the ever-increasing accidents to give an increased protection to bodily security in proportion to the development of industrial establishments, yet we must exclude from this consideration a general reform of the principles of obligation for compensation for injury. Such a far-reaching object could only be obtained in connection with the whole system of the law of obligation. At the present time the only thing we have to deal with is by way of a special law, by passing an enactment to secure compensation to those who have suffered bodily injury, and to the relations of those who had been killed in an undertaking of unusual risk."

The first section of this law provides that if in the carrying on of a railway anyone is killed or injured, the entrepreneur (*Betriebsunternehmer*) must answer for the injury so far as it is not proved that the accident was caused through *vis major* (*durch höhere Gewalt*), or through some fault of the person killed or injured.

The liability arising from this section applies in all cases of injury suffered through the carrying on of the railway, whether the injured person was a passenger, a workman, or not connected with the company by any contractual obligation.

From this it appears that all that is necessary to raise a presumption of liability on the part of the railway company is proof of the death or bodily injury on the railway, or through its working. The company then can only free itself by proving either that the injury or death was produced by *force majeure*, or by the injured person's own fault. Proof of contributory negligence on the part of the plaintiff is not in itself sufficient to remove the liability from the defendant.

The meaning of *force majeure* (*höhere Gewalt*) has occasioned much controversy. Attempts were made to treat acts and omissions of the railway officials as falling under this head, but without success, and an amendment having for its object the mentioning of injuries caused by servants was rejected as being unnecessary. The committee defined *höhere Gewalt* as "an unpreventible external accident" ("*ein*

unabwendbar äusserer Zufall") which leaves the question to be settled by the Courts.

It is unnecessary to enter into a detailed examination of this section. A few observations on disputes which have arisen as to the most important words may be referred to.

(1.) The law is only concerned with compensation for those acts which caused death or bodily injury to men, and other injuries (*e.g.*, loss of goods or injury to goods and cattle) are not included under this law, which on this head is not as wide as the Prussian law of 1838.

(2.) Railway appears to include all public means of transport on rails, including those drawn by horses (*pferdeisenbahn*), though it does not include tramways or railways used in connection with mining and similar undertakings.

(3.) The meaning of the words "in the conduct of a railway" ("*bei dem Betriebe einer Eisenbahn*"), appears to be a question to be settled on the facts of each case. It is to be noticed that the expression differs from that of the Prussian Law which uses the words "in forwarding" ("*bei der Beförderung auf der Bahn*"). The obligation arising under this section is, as will have been seen, a quite special one, in the nature of *obligatio ex lege*, though arising under circumstances creating a delictual relationship. There can therefore be no question as to the law being merely one to insure the lives or bodily security of passengers or workmen, as the railway authorities are bound to make compensation for injuries to persons with whom no contract exists. The obligation imposed on railways is absolute, and can only be rebutted on the grounds already cited.

Section 2 of this law enacts : "He who carries on a mine, quarry or excavation, or a factory must answer for the injury arising therefrom, in case the death or bodily injury of any one is caused in the conduct of the work by an agent or representative, or by any person to whom the oversight or surveillance of the work is entrusted."

This section clearly specifies the liability of certain entrepreneurs for the acts and defaults of their servants, whereas

Section 1 does not do so in so many words, though, as has been shown, this liability is clearly comprised therein. To this extent this section is narrower than the first section.

The law specifies certain undertakings, and, as is usual in the conduct of special legislation, the list is not to be widened. Mining, however, is held to include washing and stamping mills (*Wäschen, Pochwerke, &c.*), so far as they form integral parts of such undertakings, whilst smelting-furnaces, houses and foundries (*Hochöfen Schmelz und Hüttenwerke*), come under the head of factories (*Fabrik*).

Under excavations (*Gräberei*) are included digging for marl, gravel, sand, clay, loam, and such like. As regards the word "factory" (*Fabrik*), the difficulty of defining this word is well known. The Court has to settle the application of this section to given cases as the question arises. It can, however, be laid down that in no cases do building operations, or agricultural or forest work, come within the meaning of "*Fabrik*" (Wäntig, pp. 83, 84).

The persons for whom the entrepreneur has to answer are specified in this section, and appear to be sufficiently wide to include all persons in their employ as regards any acts done in carrying on the business for which they were employed (*in Ausführung der Dienstverrichtungen*).

This law does not, however, abrogate the common law altogether, and it does not deprive the person injured from suing the person who actually caused the injury. But the question may be asked, how do the two claims stand with regard to each other? Can the injured person, after recovering compensation from the railway company, sue the actual wrong-doer? The principle of solidarity, not correality, applies here, there is no *unitas causæ* in existence. The law aims at indemnification not enrichment, and the fact that the injured person has already obtained compensation in one action is a bar to another on the same ground. If the amount recovered has only been partial not complete indemnification, apparently a second action will lie (Wäntig, 85).

The railway company, however, cannot in an action under this law plead that recourse must first be had to the actual wrong-doer.

Attention must be drawn to the difference between sections 1 and 2 of this law. Under the first section railway companies are absolutely liable for injuries which come within this section unless they succeed in proving that they can be attributed to *vis major*, or to the injured person's own fault. Under the second section, proof of the injury in one of the specified undertakings raises a presumption of liability against the employer which, however, he may rebut by various defences which are not open to him under the first section.

The Swiss Law of 1st July, 1875, imposes a liability for compensation for death or bodily injury in the construction of a railway (*beim Bau einer Eisenbahn*), and in the working of a railway or an undertaking for steam communication (*Dampffschifffahrtsunternehmung*), whether such injury or death is caused by their agents (*Angestellte*) or by other persons whom they may have employed either in the railway or in the making of the line.

This does not go so far as to render them liable for injury which may have been caused by other persons to goods not left with them for the purpose of transport (Stobbe, iii. 397).

In cases other than those mentioned the liability of one person for the fault of another must be referred to a contractual relationship. Such, for instance, are the *Nauta*, *caupo*, or *stabularius*. In the draft of the Prussian Commercial Code, by Articles 42 and 57, regulations for the liability of a merchant for his factory hands and shopmen were proposed. These articles very nearly approached those of the Code Civil (1384); they were, however, rejected on a division, and the advocates of *culpa in eligendo* were victorious.

As regards carriers, however, Article 400 of the Commercial Code lays down a broad general principle very different from the Articles which we have been discussing:

"The carrier is responsible for his servants and other persons who serve him in the business of the transport undertaken by him."

It is unnecessary to pursue this branch of the subject further; we return to a discussion of general principles, but before doing so there are a few cases which may be examined.

The Austrian Commercial Court of Appeal decided in 1874 (Urtheil, vom 14th Marz, 1874; Entscheidungen, xiii. 25; Steinbach, 46), that the liability of a *conductor operis* for injuries caused by his workman in carrying out work assigned to him by the locator was an absolute one, and did not arise from any want of *culpa in eligendo* or lack of surveillance. The judgment was based on the broad principle that such a liability was required by the necessities of trade, and that the payment the *conductor operis* received was in the nature of a premium of insurance for the general public. In another case decided a little earlier by the same Court (Urtheil, vom 17th December, 1873; Entscheidungen, xii. 23; Steinbach, p. 46), it was laid down that the responsibility of carriers for the extra-contractual *culpa* of their servants, at anyrate as regards railways, was not derived from Roman law, but sprang from a common German customary law (*aber ein gemeines deutsches Gewohnheitsrecht statuirt ganz allgemein*). This principle applied both to negligence in the performance of the contract of carriage, as well as to extra-contractual negligence under the so-called *Aquilian culpa*.

The existence of this customary law is again affirmed in 1877, the Court there adding that the Saxon practice has decided for the continuance of such a responsibility being imposed on the entrepreneurs of railway undertakings, "for whoever carries on such a dangerous undertaking must be treated as the author of any damage thence ensuing" (11th January, 1877, Entscheidungen, xxi. 93; Steinbach, p. 47).

From these cases it will be seen that the Courts in Austria and Germany have been engaged in developing, for large undertakings, a wider principle of law than that

of the older *culpa in eligendo* and the laws already cited show that to some extent legislation has been engaged in the same task.

The view which the Austrian Code adopts on this subject is summarised as follows : A man is only responsible for the fault of another when there is also some blame on his own part. The chief cases of liability are when a man engages a servant or agent to do a specified act which is not done at all or done badly, or where the master makes an unwise or careless choice (*culpa in eligendo*, secs. 1010, 1161, Austrian Code), or where one has assumed the control or custody of some person or thing and neglects to exercise it (*culpa in custodiendo*), or where one takes into his house and gives shelter to a person of known dangerous character (*cp.* sec. 1314, Austrian Code).

In all cases in which one man is liable to make reparation for the wrongs done by another, the liability is alternative only, not primary, as in French law, and a master or other person or body who has had to make amends for the wrong of a servant or agent, has the right of redress by bringing an action against the wrong-doer. Sometimes the existence of this right is clearly and expressly specified in the law which creates the action (*e.g.*, the Swiss *Haftpflichtgesetz*, sec. 3), but it exists in all cases (Stobbe, iii. p. 401).

Cases in which the Treasury, state or township has, by its agents or servants, been guilty of a wrongful act may be referred to shortly. Whenever an injury is done by an agent of the state or township, if such agent is acting within the scope of his employment, the state or township is liable to make compensation. These juristic persons can of necessity only act through human agents, and the acts of such persons, if acting within their proper sphere (*wenn die Beamte innerhalb seiner Sphäre handelte*) are the acts of the *persona ficta* (Stobbe, iii. 398).

The proposition here laid down is not recognised as a general one, either by text-book writers, legislation or decisions. The subject is by no means free from difficulty. Public

officials in the exercise of their functions are often called upon to exert extraordinary force, and at times to demand implicit obedience. If in so doing anyone is injured, it is inequitable that the official who is most frequently acting under orders, should be called upon to suffer. In addition to the common-law principles which may be adduced in support of the liability of the State or other public body, the matter turns frequently on the construction of statutes and constitutional law (Wäntig, p. 3). According to some laws the State is only liable in special cases where there was carelessness in choosing or in supervising the actions of the persons employed. According to another view, since the State must act by agents, it should only be liable *in subsidium*—i.e., if the injured person does not recover compensation against the actual wrong-doer. The more generally adopted view is that the injured person has a right of action against either the actual wrong-doer or the State, whichever he prefers. This is the general rule as it applies where the wrong-doer is a servant of a private individual (Stobbe, iii. 400, and Wäntig, p. 4, and authorities cited by both writers).

CHAPTER II.

THE DEVELOPMENT OF THE GROUNDS OF LIABILITY IN GERMANY.

THE preceding examination of the laws of Germany and Austria has brought out the fact that the views of the Codes have met with much adverse criticism, and in several instances it has been found necessary to invoke the aid of the legislature in amending them. This was especially so as regards railways. Numerous writers have urged the advisability of making extensive alterations in the reasons for the liability, and so in the law itself. To this end numerous decisions of the Courts in Germany and Austria were tending.

The portion of the new German Code which deals with this matter was subjected to full and searching criticism by both lawyers and laymen.

The doctrine of *culpa in eligendo* might, as Randa remarks, have "sufficed for purely agricultural states, but does not hold good for modern industrial and trading relations." "A lamentable defect of the Civil Code consists in this, that the employer (foreman, conductor—*Werkmeister, Unternehmer*), with trifling exceptions, is not responsible for his servants either by obligation or without it, but only for the choice of his assistants, managers, journeymen *Werkleiter, Gesellen, Arbeiter* (Randa, "*Drei Gutachten über beantragte Revision des 30 Hauptstückes im ii. Theile des allgemeinen bürgerlichen Gesetzbuches*," p. 129; Steinbach, 48).

PFÄFF, in his work on the Austrian Law of Torts (*Zur lehre von Schadensatz und Genugthung nach österreichischen Rechte*, p. 85), is a strong opponent of the hitherto prevailing

theory of *culpa in eligendo*. He draws the two following conclusions :—

- (1.) "The responsibility of the master by no means only exists in those cases in which it is expressly declared by the code, but has a much wider-reaching meaning, and
- (2.) "It is in the spirit of the law to decide the question whether the responsibility rests in a given legal relation, and in doubtful cases it should be decided rather in the affirmative than the negative."

As regards contractual obligations, he lays down the rule on which the Code proceeds, "that he who, in fulfilling an obligation, makes use of a servant must answer for the fault of the latter" (p. 80), a principle which he would extend generally.

SCHREIBER has taken up the position so well known in English law, of *qui facit per alium facit per se*, when he says that the acts of a servant must be considered to be the acts of the master when done in the carrying out of any work undertaken by the latter (Schreiber, "*Der Arbeitsrestrag nach heutigen österreichischen Privatrecht*," p. 67). This statement, however, can only strictly be held to apply to authorised acts, not to acts that, although done by the agent or servant in the "carrying out of any work undertaken by the latter," are specifically unauthorised or even forbidden.

The practice of the Austrian Courts is also bringing about a state of things which can by no means be made to equate with the theory hitherto prevailing. A gas-company was compelled to make compensation to a person injured by an explosion caused through the carelessness of one of its employés. A company, said the Court, is bound to act by its servants; and it is therefore responsible (apparently absolutely) for the proper accomplishment of any work it has undertaken (Entscheidung vom 17th February, 1869, Z. 12256; Steinbach, p. 50).

On like grounds (*i.e.*, the liability of the employer for his servant's act) a river conservancy board was held liable for

an accident caused to a passing barge, through a dredger having been left in such a position that the barge struck it, and sank (*Entscheidung vom 30 Mai, 1879, Z. 2403 ; Steinbach, 51*).

The same principle was extended in one case to an injury inflicted on a workman by reason of defective plant (*Entscheidung vom 30 Sep., Z. 9073*), and in another to an injury to a workman by reason of the carelessness of a foreman (*Entscheidung vom 30 Aug., 1887, Z. 9656*). In this latter case the Court said, "according to the fundamental rule of section 1297 of the Code, there is no doubt that a manufacturer, whose workmen are employed in a dangerous work, is bound to take precautions suited to the case to protect them. The persons (*Organe*) whom he employs for this purpose, and whose directions the workmen are bound to obey, must represent him, and he must therefore answer for their orders as his own."

These latter cases, though dealing with a part of the subject to be discussed later, are cited here as showing that the tendency of the Austrian Courts is not to confine the modern development of the master's liability to third persons only, but that the same principles are applied to cases where the injured person is a workman of the same master. The public and workmen are on the same footing. Austrian and German law knows nothing of any doctrine of "common employment."

As regards the German Empire, the passing of the Code of 1896 has, for the moment, settled the question of the development of the law.

In concluding his examination of the principles underlying the liability of one person for the acts of another, Dr. Wäntig, in the work to which reference has already been frequently made, argues against adopting the sweeping proposition of Article 1384 of the Code Civil. He admitted that an extension of the principles contained in the modern legislation, of which the Imperial Law of June, 1871 is an example, might be extended to other departments of life

but he contended that it would be sufficient for practical purposes if the alteration took the form of one in procedure—viz., by shifting the burden of proof. He contended that a man should be held liable for the acts of his servants until he has shown that he had exercised due care in the choice of persons in his employ. In other words, he suggested that the theory of *culpa in eligendo* should be retained, modified by the inversion of the burden of proof (see also Goldschmidt; *Zeitschrift für Handelsrecht Neue Folge Band*, i. 371).

An examination of the memorial accompanying the draft Code shows that this is the view adopted ("*Denkschrift zum Entwurf eines Bürgerlichen Gesetzbuchs*," p. 100). The statements of the memorial on this head are short, and are of sufficient interest to justify their being set forth at length.

"In French law (Code Civil, Art. 1384) a far-reaching liability of masters for the wrongful acts (*für die unerlaubten Handlungen*) of their servants is admitted. The draft (sec. 815) starts from the standpoint of the Common and Prussian Law (A.L.R. i. 6, secs. 53, 64, 65; i. 13, sec. 86. Cp. also Sächs' Gesetzbuch, sec. 779) that a fault on the part of the master is the only justification for holding him responsible for the acts of his workmen. Nevertheless the position of the injured person is so far considerably lightened, that it does not impose on him proof of the fault of the master, but imposes on him (the master) the burden of proof of his innocence. The master can easily bring the proof in a given case; whilst, on the other hand, the burden of proof would often destroy the claim of the injured person. The master is by this (section) bound to compensate the injured person for the damage which his employé has done in the execution of the master's command and not only in its execution. This duty of making compensation does not exist when the master proves that he has observed due care in the choice of the person and the arrangement of the plant, or that the damage would not

have been avoided by the exercise of such care. A like responsibility to that of the master is imposed on him, who has undertaken for him, the choice of the person, the procuring of the arrangements, or tools, or the supervision of the matter. A liability for the acts of another is based in addition to the Common Law and the modern codes (Preuss, A.L.R. i. 6, sec. 57; Code Civil Art. 1384; Sächs' Gesetzbuch, sec. 779), on a breach of the legal duty of surveillance (sec. 816, abs. 1). Such a liability only exists if the duty of surveillance was imposed with the object of preventing injuries to a third person by the person so subjected. This presumption is like the legal duty of taking care of persons who, on account of their youth, or mental or bodily conditions need to be watched (*cp.* secs. 1609, 1662, 1776, 1873, 1891). The burden of proof is so far like that of the master, that it imposes on him who has the duty of surveillance the burden of the proof of innocence. According to strict law, he also is liable who has undertaken the surveillance (sec. 816, abs. 2)."

Section 831 of the Code is as follows :—

He who employs another to carry out any order is liable to make compensation for the damage which is unlawfully done to another person in the execution of the work. The obligation to compensate does not exist when the master proves that he has exercised due care in the choice of the person employed, and so far as he had to procure the necessary plant, or had to superintend the execution of the work, if he observed in the preparation and superintendence care requisite for the transactions, or if the damage would have taken place in spite of the necessary care.

In other words, the injured person now has to prove—(1) the injury; (2) that the defendant was the master of the wrong-doer, leaving it to the master to defend by showing that he has exercised due care to prevent the injury. In addition to this section, sec. 829, which contains the new principle of "Schadloshaltung," may in future exercise some influence in decisions on this subject.

CHAPTER III.

THE BASIS OF LIABILITY.

WE are now in a position to take a survey of the law in German-speaking countries, and to endeavour to answer the question—*What are the grounds for the master's liability for the acts of his servants?* It will be at once evident that it is by no means easy to do so. Various grounds have already been given, differing with the different kinds of responsibility. The law is still in a state of development, in a state of transition; the changes which are being effected by the Courts do not proceed on a uniform principle, and to produce the same result different reasons are often given.

This much is clear, there has been and still is a conflict between those who defend the old and narrow theory of *culpa in eligendo, custodiendo* or *inspiciendo*, and those who desire a development of law on wider principles, which are, as they contend, more in accord with the modern requirements of commercial life.

Legislation has dealt with this topic in a piece-meal manner. Railways, carriers, certain large businesses, have been selected and placed on a different footing, and even these undertakings are not all placed on the same basis.

The German legislature has, it is true, taken an important step towards laying down a general principle, but that proceeds on the old lines of the *culpa in eligendo*.

The theory of subjective liability which underlies the *culpa in eligendo* view has certainly not sufficed for modern times, and cannot, from the German standpoint, be appealed to in order to justify the modern extensions of liability imposed on

juristic persons. It was doubtless this difficulty which lay at the root of the movement, which ended in the passing of the German Law of June, 1871, though, as we have seen, the Austrian Courts were arriving at a solution of the problem from another side.

In connection with this point, the view of Dr. Gierke, in his famous work on German Company Law, is of great interest (*"Die Genossenschaftstheorie und die deutsche Rechtsprechung,"* pp. 801-803). A juristic person being a creation of the law can act only through physical agents. In the sphere of contract law there is no doubt but that such a body is bound by the acts of its representatives, even where they are guilty of fraud. The liability to make compensation for injuries is as incumbent on a corporation as on individuals, both as regards contracts and delicts. "A liability to make compensation for the faults of others falls on a body of persons exactly in the same circumstances as on individuals. Consequently a juristic person must answer for the deceit or carelessness of its representatives in executing a contract."

GIERKE's view appears to be this, that the origin of the liability lies in the family tie—i.e., is the effluence of a peculiar personal bond. This responsibility has been continued even though the relationship is now attributable to contract. May we not see in his statement a reference to the supposed inequality of the contracting parties and a suggestion that the relationship is contractual in little more than name? This principle cannot be said to hold good to-day for the modern huge commercial undertakings; though it may still to some extent be said to exist in domestic life. In these great enterprises servants have often been looked upon as mere tools, and injuries caused by them viewed in the same light as defects in the machinery. This view has been adopted by many lawyers, though perhaps on insufficient grounds, and though in its inception the liability may have had the suggested origin (*cp.* Brunner, *Deutsche Rechtsgeschichte*, i. sec. 12), it is impossible to compare the old

family with the paterfamilias at its head with the modern factory system, or large undertakings such as railway companies.

LOENING follows a very different line of thought (" *Die Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten*," p. 89). His argument is shortly this: "The great businesses of modern times are mostly carried on by joint-stock companies. To make one of the employés responsible for injuries caused in the work would be an injustice, not, however, because the wrong-doer is a man of straw, and cannot pay, for it may well happen that the business itself is being carried on at a loss. The real reason is that such businesses, carried on as they are in the interests of private individuals, carry risks which cannot be avoided by the exercise of even the greatest care, and in which the slightest mistake may have the most dangerous results. The community which allows the existence of these businesses demands in the interest of the public that all injuries to themselves should fall on the undertaking; this responsibility is a part of the common cost of the undertaking, and the entrepreneurs must make provision for it accordingly. In the business itself is no wrong, for it is not unlawful, but there is danger in it. The community which allows such dangerous businesses can, and must, demand that he who undertakes them shall take the risk. It must make him liable to make compensation for the injury. The guarantee imposed on them belongs to the common cost of the undertaking" (p. 89).

Dr. STEINBACH in referring to this view in his work, to which reference has been frequently made, remarks that Loening's view, in his opinion, has a large amount of truth, though it does not satisfactorily explain the reason why numerous small but dangerous businesses are still left to the *culpa in eligendo* theory. In the earlier part of his essay, in dealing with the class of cases which comes under discussion in England under the maxim, "*Sic utere tuo ut alienum non lædas*," he has contended for the application of

such a principle in German law, and has shown that, as a rule, where anyone dealt with his property in any way particularly dangerous or unusual to the district, he was bound to make compensation to adjoining owners for any loss they sustained.

In the "Rapport fait au tribunal," on Article 1384, it was said, "*N'est ce pas en effet le service dont le maitre profite, qui a produit le mal qu'on le condamne à réparer?*" In other words, the maxim of Ulpian, "*Ex qua persona quis lucrum capit ejus factum praestare debet*" (Ulp. i. 149, D. *de regulis juris*) is appealed to.

This is the principle, says Dr. Steinbach, which at bottom underlies the modern Austrian development, "*qui sentit commodum sentire debet et onus.*" The modern German and Austrian insurance legislation, he contends, bears out this view, and in many cases masters have voluntarily made provision for the injuries caused to their workmen on a scale far exceeding the requirements of this legislation. The premiums paid by the masters are treated as part of the cost of production, and the price of the articles manufactured or produced is fixed accordingly, the premiums being in reality paid by the purchaser, or by reduced wages of the workman. Provision against accidents to workmen being therefore taken into account in calculating the cost of an undertaking, this argument might with equal force apply to injuries inflicted on third persons by servants in the scope of their employment. In special cases—mines, factories, &c.—as has been already seen, the principle of absolute liability has been adopted, and this principle might well be extended and applied as a general rule (p. 61).

Another argument which he adduces on behalf of this contention is the case of England and her daughter States and France. When great commercial nations, such as these, adopt the wide principles of liability of the English common law, and Article 1384 of the Code Civil, this, he urges, is in itself one of the strongest arguments for his contention. Servants are very much like tools, which the employer uses

for his own advantage ; if in using them loss is incurred, that is a risk to be considered by the employer and provided against. The question whether profit or loss accrues to him from his undertaking is beside the point ; he carries on the business with a view to profit, and the mere existence of that business creates the risk (p. 63).

It is clear from what has gone before that this is merely an aspiration. The German law has by no means gone as far as Dr. Steinbach would wish. The Austrian Courts, it is true, are approximating more nearly to it than the German ; but in neither country has the general principle of Article 1384 of the Code Civil found acceptance.

Another point which appears to have been of great influence in assisting a solution of the question is the relative position of the parties. It is clear that, especially as regards the larger undertakings, the fact that they are wealthy and important organisations, that their servants as a rule are men of straw, that to leave a person who has been injured to a remedy against the servant only would be to leave him without a remedy at all, was by no means absent from the minds of the legislators and judges in both Germany and Austria. The feeling that a remedy which is unsubstantial is no remedy, and that somebody ought to suffer for the injury, ends in that somebody being the master (Pollock, "Employers' Liability"). The notorious ill-odour of railway companies in England and America in Courts of law is cited by some of the writers on this subject as some sort of reason for the position taken up by their Courts. This necessity for a solvent defendant has doubtless had its influence, but the difficulty of bringing the evil home to any special person has gone along with it.

The reasons why in Germany certain business undertakings were selected for special legislation, as given in the memorial for the law of June, 1871, cited above, are : " The greatness of the danger connected with railway undertakings, and the confidence which the public is bound to repose in them, &c., imposes on them the greatest degree of liability."

The greater the danger the greater the responsibility. These great undertakings (though not necessarily so dangerous as many smaller ones), with their machinery, engines, plant, and numerous employés, all working together like some vast machine, cause the individuals employed to lose their individuality, and to become mere tools. Persons who are brought into contact with such undertakings find themselves in a powerless condition. Feeling themselves to be so powerless, they, acting through the Legislature, had, for their own protection, therefore imposed on such undertakings absolute responsibility for everything they may do. "It is," says Steinbach, "a quite comprehensible feeling which compels us to impose a liability on those with regard to whom we feel powerless for doing or not doing things to our detriment" (p. 64).

This reasoning also to a great extent will explain why small but dangerous undertakings were not comprised within this law. There is not the feeling of utter helplessness on the part of the individual which exists in the former case; he feels more on an equal footing with the individual, and so can look after his own interests.

If the question is examined closely it will be seen that the real reason, which has actuated the making of this distinction, is similar to that which underlies nearly all the modern continental legislation on the subject—viz., that of professional risk (*risque professionnel*). It is true that in this case it is only the question of injury to a third person that is being discussed, but the laws in question are general, they include also injuries to workmen engaged in these undertakings, and, in fact, appear to a great extent to have been passed chiefly in their interest.

"C'est dans la *grande industrie*, ou dans les entreprises analogues, ou dans celles à qui l'emploi des forces élémentaires comme moteur communique un caractère particulier de danger, c'est dans ces industries seules que le risque professionnel peut être légitimement reconnu" (Duché, p. 38).

"Votre commission . . . a pensé qu'un fait nouveau

résultant des transformations de l'outillage et des nécessités de la proclamation auxquelles nul ne peut se soustraire, ouvriers ou patrons, il y avait lieu d'introduire dans notre législation, sous le nom de *risque professionnel*, un droit nouveau" (Tolain, p. 8).

The examination of this new doctrine of professional risk is left to the second part of this subject. Its practical importance may be gathered from the debates on the Compensation for Accidents Bill in the House of Commons.

The results of these various opinions may be stated in this way:—A master is responsible for wrongs committed by his servant on one or some of the two following grounds:—

- (1.) Subjectively, as for *culpa in eligendo, inspiciendo* or *custodiendo*.
- (2.) Objectively. These are numerous, comprising the arguments advanced by Schreiber, Loening, Gierke, and Steinbach.

Ownership and undertaking appear to be the two words which may summarise this second head (Steinbach, p. 65), and there is nothing unfair in making the owner and undertaker bear the losses as well as the profits of his undertaking. The terms "ordinary" and "usual" play a large part in the law of compensation for injuries to property. It is where extraordinary or unusual danger exist that extraordinary and unusual obligations are imposed. Persons who carry on businesses which come under this head are therefore saddled with extraordinary obligations—the greater the right, the greater the duty.

The reasons given for the master's liability in the English common law, says Mr. Justice O. W. Holmes, afford a striking example of the very common phenomenon that the customs of a primitive time often established a rule which remains whilst the reasons for its general imposition have been forgotten. "Some ground of policy is thought of which seems to explain it, and to reconcile it with the present state of things. . . . The old form receives a new content, and in time even the form modifies itself to fit the

meaning which it has received" ("Common Law," p. 5). This remark applies equally to the subject under examination.

It has been seen that in Roman law and in the early Germanic Folk laws, similar rules existed as to the master's liability for his slaves' acts. First, there is the absolute responsibility, coupled with the feeling of vengeance on the part of the injured person, which could be appeased by the surrender of the slave; at a later period comes the payment of a compensation in lieu of surrender, at first perhaps an alternative, and later the rule, especially in Roman law under the Aquilian action (D. ix. 1. 1, 4, and 5). Ship-owners, innkeepers, and stable-keepers then become absolutely liable for any injuries committed by their servants (free and unfree) on special grounds. This was a great advance on the permission to ransom the slave by paying a compensation.

All servants are now free, they are as capable of being sued as their employers, and yet the principle of the Roman law is in France absolutely, and in Germany conditionally, the basis of the modern law. Still, in many cases the reasons of the Roman jurists are adduced in justification for the existence of the law. But these reasons are being added to, and varied. The rule now exists, but the reasons given for it change.

A rule which has survived for so many centuries under such divers conditions, and has been found necessary in different nations, must have a justification for its existence.

To generalise from all the reasons adduced in its support, irrespective of time and place, and to construct a proposition which would universally apply, to elaborate a neat theory and lay it down as a certainty, would be an impossibility. "Some ground of policy is thought of which seems to explain it, and to reconcile it with the present state of things," may have been said of this rule at any period of its existence.

Public policy suggests utility, what is the particular utility under which this rule can be brought? Instead of answering this question, let us ask another. What would the state of society be if the rule did not exist? A serious

railway accident happens through the negligence of a pointsman ; many persons are killed and more injured. The only person liable on such a supposition is the pointsman, and to him the injured parties go for redress.

A number of men are engaged in the execution of some great undertaking. Owing to the negligence of one of their number, but which one it is impossible to say, a serious wrong is suffered by an individual. Owing to the impossibility of fixing the liability on anyone of them, is he to go without a remedy at all ?

Take any of the cases in which the master has been held liable, and imagine the case decided the other way, and the only redress to the injured person to be an action against the actual wrong-doer. It will as a rule follow either that injustice will be done to the injured person, or to the wrong-doer himself.

It is said that the rule of vicarious liability which has been under discussion is a flagrant violation of one of the fundamental principles of law, and that it is hard on reasonable grounds to justify it. It has been shown, however, that in some form or other, with greater or less precision, the rule is in force on the Continent, and its existence amongst English-speaking races is well known. There are indeed cases of no infrequent occurrence in which its application is an undoubted harshness, but on the whole civilised humanity has recognised the justice of its existence, and it is worth while enquiring in what direction that justice lies.

Maxims such as "*respondeat superior*," and "*qui facit per alium facit per se*," may at once be discarded as rational bases ; to state a rule is not to justify it, to state the effect of a rule is not to give a reason for its existence.

It is assumed that the rule in question is abnormal, that it belongs to a particular branch of the law, and possibly is a reminiscence of a state of society which cannot be compared with that of to-day. But this is not the only case in which a man is made answerable for an injury, the cause of which may be, and very often is, beyond his own control.

In all foreign Codes there are statements of which the following, taken from the Code Civil, is a fair example:—"The owner of a building is responsible for the damage caused by its fall, if it happen by reason of the fault of the maintenance, or by the fault of construction" (Article 1386. See also Swiss Code, Article 67; Italian, Art. 1155; Austrian, 343; Saxon Code, 31). The owner is thus made liable for something of whose existence he is entirely unaware. He has employed a builder to build his house, or to repair it; not being a builder himself, he is naturally bound to leave the whole matter to a professional man: yet, if anyone is injured by the fall of the house, the owner cannot shelter himself behind the builder, but is clearly liable under these Articles.

Take again the case of liability for injuries committed by animals. French, German, and Austrian Codes all contain provisions, making the owner liable for injuries done by them, unless it is shown that the injury was induced by the injured party (Saxon Code, Article 1560; Code Civil, Article 1358): the liability in such cases is a subjective one.

The ownership of land carries with it certain duties, the most important is that in using it the owner must have regard to his neighbour's rights. "Whoever erects a factory, or carries on a business concern, has to do so at his own risk, not at the risk of the neighbourhood," says Unger (p. 729). The injury caused by the carrying on of certain dangerous trades gives rise to an action which is in the exclusive cognisance of the ordinary tribunals (Sourdat, "Traité de la responsabilité," vol. ii. p. 599). The owner of an iron-foundry in Austria may be condemned to make compensation for the fall of his neighbour's wall through the vibration of the machinery in his works.

In all the cases considered, other than those of master and servant, and there are others besides, a man is held liable for acts and occurrences far beyond his own personal control. What is the general principle which may be said to underlie these cases? Whoever exercises his right in an unusual and extraordinary manner, says Unger (*Zeitschrift*, "*Für das fürst*

und öffentliche Recht, vol. xiii. p. 715), must answer for any damage thence arising.

This statement contains the basis of a common liability. It is probably connected with the *culpa in custodiendo* or *in eligendo* view, but the result is that in all the cases considered, a man has for purposes of his own induced a state of things which may as a natural consequence produce harm to other persons: if that harm happens, either by the fall of a wall or building (? *culpa in eligendo* of builder), the trespass of cattle (*culpa in custodiendo*), the escape of noxious fumes, or the explosion of a boiler through the carelessness of the man in charge, the owner must answer for it. The factory, the business, is becoming personified, it is the owner's "undertaking" (*unternehmung*), men and machines form an integral part of it, the undertaking is his property, and so far as the carrying on of such undertaking subjects his fellows to risk, the entrepreneur must answer for it. It is only reasonable that those persons who enjoy the profits of establishments as owners and entrepreneurs, should also have to make compensation for the disadvantages which have been caused by these institutions to others (Steinbach, p. 65).

Servants and machinery go to make up one whole, and the master is liable for the proper carrying on and management of his undertaking. The undertaking is easily identified, the entrepreneur known. There are, moreover, many cases in which the individual wrong-doer cannot be specified, whilst the business in which he is concerned being treated almost as a living entity acting through human media is an identifiable concern. In the majority of cases also the undertaking is a concern worth suing, and the workman is not worth powder and shot.

"Should we now-a-days hold masters answerable for the uncommanded torts of their servants, if normally servants were able to pay for the damage that they do?" is a question asked by great English lawyers (Pollock and Maitland, *Hist. Eng. Law*, ii. 532). Possibly we might. The State is not concerned necessarily with providing a solvent

defendant. The point as regards French law has been raised. It has not been without its importance in German law, but it will not provide a complete answer to the question. The State is concerned necessarily with providing redress against someone, for breach of a right (*ubi jus ibi remedium*). This has, in conjunction with the possible insolvency of the workmen, played a great part, and it may be that this combination underlies the conclusion suggested. But it is equally possible, and the more the subject is examined, the more the conviction grows, that no complete answer can be given to the question.

The employer, whether a private individual or a corporation, is equally liable (Gierke, *op. cit.* p. 801), and if the rule were other than that stated, since a corporation can only be negligent by its officers, it would not be liable at all (Pollock, "Employers' Liability," Essays, p. 127).

The public which consents to the existence of such a state of things in its own interest demands that a far-reaching responsibility shall be imposed on persons who in the exercise of their trade or profession make use of the services of others. That men are tools and used as such is after all a metaphor, the use of which in any argument is extremely dangerous. If tools, they are also men, and this fact carries with it many important consequences. To take this contention one step further, it is on some grounds of *public policy* that modern legislation has ratified and extended this liability. The expression "public policy" is admittedly a vague term, and one which is perhaps much overworked, but under various periphrases it is met with in those important cases in Austria and Germany, which have to a great extent aided in the modern development of the German law. It appears, for instance, as "the development of trade," "the social evolution," "the inapplicability of the *culpa in eligendo* theory to private corporations and joint-stock companies," "the nature of the case." One and all point to the same end—viz., the subordination of the individual (natural or fictitious) to the State, and provide

another striking illustration of that trite maxim, *salus populi suprema lex*.

This appears to provide a rational basis for the master's liability to-day, but in saying this it must not be forgotten that it has already been demonstrated that all German and Austrian law is not so far-reaching as English and French law on the subject. The want of ordinary and reasonable care must still, to a great extent, be shown by the carelessness of the master in making his choice of servants; or, putting it another way, the master can rebut the presumption of blame by showing that he used all reasonable care in the choice of his subordinates, and in superintending their work (*e.g.*, German Code, Art. 831). And because the servants form part of his undertakings, he only becomes liable so far as they are acting as a part of it, or, as the English law expression is, when acting within the scope of their employment.

There is, however, this advantage accruing to German and Austrian masters, which the French and Belgian master has not. The former can show that they have taken all requisite care in the choice of their servants and in the conduct of their business, and if notwithstanding this the injury has been inflicted, they are exonerated from blame. Not so the latter; Article 1384 of the Code Civil is absolute. Masters cannot allege that it was impossible to prevent the injury caused by their servants and employés in the functions for which they were engaged. *Vis major* is their chief defence.

The position of the German and Austrian employer of labour, since the passing of the modern insurance laws, has been made sufficiently onerous, and it can be well understood that attempts made by the draftsmen of the new Code would have met with severe criticism or strong opposition if they had proposed the alteration of the common law on the lines of Article 1384. We have seen that the alteration has not abolished the old basis, but has merely had the effect of inverting the burden of proof. It is true the master's burden

is increased, but he can still avoid a liability by showing he has exercised due care in the choice of the employé and in the arrangement of the plant, or that the damage could not have been avoided by such care (Article 831).

Note.—It is not without interest to compare the different reasons given by German legislation, judges, and writers for the existence of these rules, with those given by the English judges.

M'Donnell, in his work on "The Law of Master and Servant" (p. 295), has summarised these reasons under the following heads:—

- (1.) The servant is the agent of the master—*Qui facit per alium facit per se*. Compare with this Schreiber's view, *ante*.
- (2.) "By employing him I set the whole thing in motion, and what he does for my benefit, and under my direction, I am responsible for the consequences of the doing of it." Lord Brougham, in *Duncan v. Findlater*, 6 C. and F. 910. With this may be compared the view of Steinbach.
- (3.) "There ought to be a remedy against some person capable of paying damages to those injured. Willes J. in *Limpus v. L. G. O. Co.*, 1 H. and C. 526. Compare Loening's view.
- (4.) "Because strangers had no hand in the choice." Bramwell B. in *Swainson v. N. E. R. Co.*, 3 Ex. D. 341. This view of Lord Bramwell's is remarkably like the German common law of *culpa in eligendo*.
- (5.) "Where somebody must suffer it is right that the person who employed the deceiver should." Holt C.-J., in an action for deceit. With this compare Gierke's view.

In discussing the principle on which such a liability as that under discussion is based, Bentham (vol. i. 383) lays down the following proposition:—"The obligation imposed upon the master acts as a punishment and diminishes the chance of similar misfortunes. He is interested in knowing the character and watching over the conduct of those for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him answerable for their imprudence."

CHAPTER IV.

FRANCE AND COUNTRIES GOVERNED BY THE CODE CIVIL.(a)

WITHOUT entering into the vexed question of the date of the Lex Salica, or as to whether or not it contains traces of Roman influence, as has been suggested by M. Tardif and Dr. H. Brunner, it may be stated that it is generally accepted that this celebrated law is one of the oldest legal monuments of the Frankish race.

The nature of early Teutonic legislation is too well known to need discussion. As was the case with most of the Anglo-Saxon laws, the Lex Salica was a regulation of self-redress, and was mainly a tariff. If such and such an injury is done, the wrong-doer pays so much. The master of a slave was the owner of a thing, and if injury was caused by his property to another he had to make good the damage, or pay a sum as fixed by law. It was the same whether the wrong was done by a slave or an animal (cap. xxvii. 4; xxxvii. 8). According to the strict wording of this enactment, the slave pays, but it is the master who bears the burdens, and is bound to repair the wrong (*Lex Salica emendata*, xlii. 14).

The instances given in the Lex Salica are numerous, and

(a) Whilst engaged in examining authorities for the early French law, I communicated with Professor Henri Beaune of Lyons, who was good enough to give me much valuable information. As a result of my enquiries he contributed two Articles to "*la Revue catholique des institutions et du droit*," which appeared in September and October, 1897. These articles introduced to me many texts with which I was hitherto unacquainted, and I beg to make my acknowledgments to Professor Beaune for much of the contents of the early part of this chapter, especially the part relating to the law of the Middle Ages, which is little more than a translation of parts of Professor Beaune's second article.

it is sufficient to give examples.(a) *Dominus vero servi, qui furtum facit, capitale et dilaturam requirenti restituat* (L. Sal. xxvii. 4). *Si vero furaverit quod valet xl. denarios, aut castretur, aut ccxl. denarios qui faciunt solidos vi. reddat* (cap. xiii. 2).

The master can, however, to some extent, free himself by delivery of the slave to the injured party, and if he does so, the compensation is diminished by a half (cap. xxxv. 5). It was possible, therefore, that the owner of a slave would suffer a smaller loss if he paid the compensation than if he delivered him up.

In the *Capita extravagantia* of the Lex Salica, published by Pardessus, a new system appears (sec. 28). According to the Lex Salica, a slave who murdered another was divided between the two masters, but according to the *Capita extravagantia*, the owner of the murderer must pay to the owner of the murdered slave the value and 15 solidi. The same rule is also applied to workmen (*operarii, artifices*), for whom the employer is liable (Beaune, p. 230).

The *Lex Ripuaria* (which was the law of the folk inhabiting that part of Belgium and France lying between the Meuse and the Ourthe, and extending to Cologne) is in the main the same as the Lex Salica. The master of a slave who causes a fire pays a fine of thirty-six sous d'or and the damage, unless he can prove his innocence with six witnesses on oath (Lex Rip., tit. xvii. 2; xviii. 4; xix. 3; xx. 1).

In a *Capitulary of Charles the Bald*, extracted from the Lex Langobardorum (cap. ii. 12), a slave who has damaged crops is beaten, but his master pays triple damages.

The liability imposed by the Lex Salica was heavy, and the Church had endeavoured to evade it, but the Pact between Clothaire and Childebert, and the Decretio of the latter lay down the rule as absolute, and admit of no exception (cap. vii. of Third Capitulary of 819. Guétat., "Hist. du Droit français," p. 132; Beaune, p. 231).

(a) Other instances are given by Dr. Beaune, pp. 227-29.

In the *Lex Romana Burgundionum*, prepared for his Roman subjects by Gundobald, king of the Burgundians, we have a barbarian code, with a large infusion of Roman law. One point of importance appears in this Lex, it appears to some extent to adopt the theory of *culpa* of the Roman Law. The master, it is true, is, as a rule, liable for his slaves' acts, but not in quite the absolute manner of the Lex Salica. Where a runaway slave wounds his pursuer (tit. vi.), or commits a theft (tit. xxi.), his master is not liable, for he is no longer under his control. So, too, if a slave cuts trees in the woods of another, as his master cannot follow him into the forest, he is exonerated, but the slave is beaten (tit. xxviii.). So, too, the master is freed where the injury is the result of accident (tit. xviii.). The rule of liability to which the foregoing are exceptions is seen in such cases as where a master puts his slave to work at material entrusted to him by a customer and the material is damaged, the master must make satisfaction or hand the slave over (tit. xxi. 2). In case the slave is killed, the master is not thereby exonerated from his liability, he must still make compensation for the wrong (tit. iv. 2).

The *Lex Antiqua Visigothorum* contemplates the possibility of the slave making compensation himself. "*Si vero servus hoc sine jussu domini fecerat, omne dampnum aut ipse aut ejus dominus reddat*" (L. Visig. lib. viii., tit. iii. 10). This law also recognises the right of noxal surrender (lib. viii., tit. iii. 6). Of all these early laws the Lex Burgundionum appears to be the only one in which the responsibility of the master is in any way connected with any subjective liability, in all the others he is liable because injury has been committed by his property.

With the fall of the Frankish empire legislation of every kind is at an end, the midnight of the Dark Ages is unbroken by rays of legislative light.

The Lex Salica, however, survived, though with what force one hesitates to say, possibly under the form of local customs; both it and the Lex Burgundionum appear at the

commencement of the Middle Ages. The former is cited at a Council of Limoges in 1031; it is in force in the Tyrol in 1166, and in Luxemburg in 1192 (Beaune, p. 331).

In the twelfth century comes the first great revival of Roman Law, and the consequence is naturally to substitute the Justinianian law more and more for the bastard law of the *Breviarium Alarici*, under which the country of the "pays du droit écrit" had been governed. When, however, the liability of the master owing to his being in fault first appears it is difficult to say.

The charters of the twelfth century, when they contain regulations on the question we are examining, show little advance on the old barbaric laws (e.g., Bourges, 1181, and Amiens, 1190. Beaune, pp. 333, 334). *Le très ancien Contumier* of Normandy (1200–1220), and the *Customs of Tourraine-Anjou* (1246), are silent on the subject.

In the south the influence of Roman law was spreading, and soon Orleans became a centre of the sphere. This influence is shown in two works—*Le livre de Jostice et de Plet*, compiled after 1259, and *Les Etablissements de Saint Louis* of 1273. *Le Conseil à un ami*, written by Pierre de Fontaines between 1254 and 1259, "*selonc les us et costumes de Vermandois et d'autres corz laies*," contains a mixture of laws taken from the Code of Justinian.

The author of *Le livre de Jostice et de Plet* devotes a chapter to the translation of the *Lex Aquilia*, and lays down the rule that a person having a lunatic under his charge is liable for any injury he may do, because he has not carefully looked after him (L. i. cap. xxi. 5). The father and master are liable for injuries caused by their infant sons or servants to things left in their charge. The same rule is given in *Le Conseil à un ami* in the chapter on *Taverniers et Hosteliers*, which the author has taken from the Digest, the reasons being those of the Roman law (xx. 9. Beaune, p. 336).

In examining the liability for the delict of private war, Prof. Beaune gives instances of an interesting variation in

the answers given by three famous authors of the Middle Ages. This delict was punished by a fine of 60 pounds to the sovereign. If a knight leads a body of men, according to *Le livre de Jostice et de Plet*, he alone is liable, "*et garantist toz ceus que le maine*" (L. xviii., cap. xxiv., sec. 35). *Les Etablissements de Saint Louis* are in accord with this if the leader is a *bers* or knight, if not, each man pays the full fine (L. ii. cap. xxxviii.). Beaumanoir, in *La Coutume de Beauvoisis*, lays down an even more stringent rule. The leader, he says, is always liable whether a knight or not; if a knight he pays 60 pounds for every man with him, because he has abused his authority; if not, he pays 60 pounds only (cap. xxx., secs. 58, 59; cap. xxxiv., sec. 42). The "*Swabenspiegel*," in accordance with the German mediæval law, says that each is liable (Edit. Matile, p. xlii. Beaune, p. 338).

Elsewhere Beaumanoir enumerating the persons for whom a man must answer says they are "*Cex qui sunt en se mainburnie et ceux de sa mesnie qui sont à son pain et à son pot, ou à son loier*," and his liability for the latter is because "*Il doit avoir tel mesnie qui ne face pas*," injuries—i.e., because he must make a careful choice (cap. xliii. 41; xxxiv. 5. Beaune, p. 339). The customs of Montpellier (1204), seem to contain similar views (Giraud, vol. i. 63).

The Roman law was not accepted in France without a struggle, and though in committing to writing local customs much Roman law was incorporated, and the classification of the Roman law of obligation, for example, was adopted in *Le Style du Châtelet* (Viollet, p. 603), yet writers such as Beaumanoir were at pains to assert that they were following and recording local customs even when they were copying from the Code or the Digest.

In 1304 Philip IV. forbids advocates to quote Roman law against customs and royal proclamations, and when Parliament ratified the privileges granted to the Universities, it was always with the reservation *sans reconnaître force de loi au droit romain dans le royaume* (Beaune, p. 341).

In the fourteenth century there are two conflicting decisions of the Parliament of Paris as to the liability of a master for a fine inflicted on his servants when they are unable to pay, showing that the idea of a free man though a servant being himself liable is, as was the case in Germany, a possible solution. It is true that the decision in which the servants were themselves compelled to pay was treated as bad law by subsequent writers, but as Prof. Beaune points out, these commentators write too long after the decision for their opinion to be of weight in deciding what the law was in that century (Beaune, p. 342).

Of one special form of liability—viz., damage caused by fire, there is more evidence. During the Middle Ages this liability was absolutely enforced; in stringency it exceeds the Roman law. It is, however, a special branch of the subject, which, owing to the necessity of preserving the safety of the community, necessitated its more careful enforcement (Pollock's *Torts*, 4th ed., p. 444). In the Customs of Normandy (Art. 453), and Anjou (bk. i., tit. iv., cap. 44), the master's liability for fire is absolute, and this appears also to be the case in Arts. 8 and 9 of cap. 17 of the *Chartres généraux du Hainaut*.

Choppin in commenting on the customs of Anjou, says: "*Le maître du logis doit indistinctement répondre de ses domestiques, de ses pensionnaires, hôtes et sous-locataires.*" Choppin's remarks as to the reasons for this liability show a strange confusion of ideas, Roman law and barbaric law being intermingled. According to him a master is liable for his free servants, "*qui se trouve avoir manqué en l'affaire que nous luy avons commise,*" but for the serf the master can free himself by handing him over for justice (*Comment. de la Cout. d'Anjou*, bk. i., art. 24).

Choppin also cites a case in 1581 in which a master was condemned to repair a house which had been burnt down by the carelessness of his servants. There are similar cases in 1605 and 1663.

As late as 1779 it appears to have been doubted whether

workmen and menial servants should be treated on the same footing (see Merlin "Incendie," vol. x.).

An Ordonnance of Francis I. in December, 1540, forbade men to take into their service unknown persons or persons of bad character, on pain of answering civilly for the delicts which they committed during their service.

By the seventeenth century the law of Article 1384 of the Code Civil appears enunciated by Domat (1625-1696). "*Ils (i.e., les commettants) répondent du fait du dol et des tromperies des personnes qu'ils ont préposées* (La loi Civile, bk. i., tit. 16, sec. 3, § 1).

Pothier (1699-1772), on whose famous work, "*Traité sur les Obligations*," published in 1760, much of the Code Civil is based, states the law as follows: "Masters are held responsible for the wrong caused by the delicts and quasi-delicts of their servants and workmen whom they have employed in any service. They are even liable in the case in which it was not in their power to prevent the delict or quasi-delict, when such are committed by such servant or workmen in the exercise of the functions to which they are employed by their master in his absence. This has been established to render masters careful only to be provided by good servants" (vol. i., sec. 121).

Though the master was civilly liable, he was not as a rule liable for the payment of fines inflicted on his servants. There were, however, exceptions to this rule.

By an Ordonnance of 1669 masters were compelled "*rèpondre civilement des amendes encourues par leur enfans et leur domestiques*" for cases of "*delits de pâturage dans les bois*."

Again, by a law of 1791 on the subject of customs, "*les propriétaires des marchandises seront responsables civilement du fait de leurs facteurs, agens, serviteurs et domestiques, en ce qui concerne les droits, confiscation, amendes et defens*" (Merlin, sub. tit., *Responsabilité*, vol. xv.). The Ordonnance of 1669 appears to have been recognised as binding since the Code Napoleon, as a case before

the Cour de Cassation on 13th January, 1814, recognises that, though as a rule, in order to render a master liable for his servants' acts, the wrong must have been committed "*dans l'exercice des fonctions auxquelles ils les ont employés*," yet in case of special law, as regards *delits forestiers*, the liability is absolute (Sirey, vol. ii. p. 222).

It appears, from an examination of the foregoing authorities, that the modern French law is developed about the sixteenth century. This century saw the second great revival of Roman law, and may be called the French revival, as that of the twelfth century was Italian in its origin. The idea of a personal fault on the part of the master, as the cause of his liability, makes its appearance soon after the first revival, supplanting the old Germanic view, which rendered the master liable for his slaves' acts for the same reasons as for injuries committed by his animals. From the sixteenth century judges were supplementing the customary law by Roman law, and *culpa in eligendo* is recognised as a judicial theory, laying down an absolute rule of liability as far as the servant is acting within the "scope of his employment."

The basis of the modern French law is the Code Civil which, in the main, represents the Code Napoléon. This great legal monument was published in 1804, and was introduced into the Prussian Rhine Provinces, the Rhenish part of the grand Duchy of Hesse, and the Bavarian Palatinate. The Baden Landrecht is a modified translation of the Code which was published in 1809. The Code Napoléon also constitutes the basis of the law of Belgium, and with some modifications that of Italy, Spain, Chili, Mexico, Mauritius, and Lower Canada. Article 1384 of the Code Civil, which contains the law as to the liability of the masters for the acts of their servants, is as follows:—

"Every one is responsible not only for the damage which has been caused by his own act, but also for that which is caused by the act of persons for whom one ought to answer, or for things which are under one's control (*mais encore de*

celui qui est causé par *le fait des personnes dont on doit répondre ou des choses que l'on a sous sa garde*). The father and the mother, after the death of the husband, are responsible for the damage caused by their infant children living with them; masters and employers' (*les mattres et les commettants*) for the damage caused by their domestic servants and workmen (*domestiques et préposés*) in the functions to which they have employed them; schoolmasters and artisans for the damage caused by their pupils and apprentices during the time that they are under their supervision (*surveillance*). The above responsibility exists unless the father and mother, schoolmaster and artisans, prove that they have not been able to hinder the act which has given rise to the responsibility."

Intimately connected with Art. 1384 are the two articles which precede it, articles which are often quoted as examples of the manner of the Code in laying down for the first time in the history of modern legislation broad principles, the application of which is left to the judge.

Art. 1382 is as follows:—"Every act whatever of man which causes injury (*dommage*) to another renders him *by whose fault* it is caused liable to make reparation."

Here the law takes the word "*faute*" in its widest sense, comprising all kinds of imputability, delicts as well as quasi-delicts.

Art. 1383 has for its object the definition of "*faute*" in the matter of "*faits dommageables*," and is as follows:—"Every one is responsible for the injury which has been caused not only by his act, but also by his negligence or imprudence."

The Code Civil, though classifying wrongs under delicts and quasi-delicts, contains, as is well known, no definition of terms. Pothier, whose work is the basis for this portion of the Code, defines them as follows:—"A delict is an act by which one person by fraud or malice (*dol ou malignité*) causes any injury or wrong (*dommage ou quelque tort*) to another." A quasi-delict is "an act by which one person,

without evil intention, but by an imprudence which is inexcusable, causes any wrong (*tort*) to another" (Pothier, vol. i. sec. 116).

Both have this in common, that the act results in an injury or wrong (*dommage ou tort*), but delicts are done intentionally, quasi-delicts are the result of negligence.

Art. 1384 refers only to quasi-delicts, as it does not presume the intention to injure, and yet the injury is the result of an inexcusable imprudence.

As was to be expected, much difficulty has been occasioned by the words "imprudence" and "negligence" in Art. 1383, but the result of numerous decisions appears to be that they are taken in a very extended sense (*see* Laurent, *Principes de Droit civil*, vol. xx. p. 501; cases cited by Sirey, vol. ii. p. 198).

I. The answer to the question what is the basis of Article 1384 falls under two heads. On the one hand, it is held that a master is liable for his servants' wrongs, because he has chosen the servant to represent him, and has not been fortunate in his choice. On the other hand, it is contended that it is more than a mere question of choice; the master has a right of directing and overseeing the work of his servant, and must himself answer for injury done where he has been negligent in his surveillance.

The *first* theory, that of *culpa in eligendo* is held by Demolombe, and Laurent (vol. xx. sec. 570). The latter writer adduces in his support the dictum of Pothier, already quoted, that the liability exists "*pour les rendre attentifs à ne se servir que de bons domestiques.*" Bertrand de Greuille in the "Rapport" adopts the same view: "Is it not, in fact, the service by which the master profits which has produced the evil which he is compelled to repair? Has he not to blame himself with having given his confidence to wicked, unskilful or careless men; and would it be just that third persons should be victims of the careless confidence which is the first cause, the true source of the injury which they feel? The law only ratifies here what equity commands, that which

frequent and grievous examples render necessary, and which the jurisprudence of all times and countries has sanctioned."

The *second* theory is maintained by Dalloz, Sourdat, Larombière, Baudry, Sainctelette, and Willems. This view demands more than the former, making the master liable for non-surveillance, not merely for *culpa in eligendo*. M. Sainctelette, in examining the *culpa in eligendo* view, says that directors of railway and steamship companies, owners of mines and factories, would be astonished if they were informed that it was a legal axiom that the surveillance of the workmen by his master was in many cases impossible, and that they were only liable because they had made a bad choice. No, he proceeds, the reason of the liability is because of directions badly given, or want of care in seeing to the execution of orders (*De la responsabilité*, p. 126).

M. Sourdat uses similar arguments (*De la responsabilité*, vol. ii. p. 119). In opposition to the statement of Bertrand de Greuille may be adduced that of the Tribune Tairrible, who, in speaking before the "corps législatif," said: "Employers are invested with a sufficient authority to restrain their subordinates within the limit of their duty and respect to the property of others. If they exceed these limits, such excess is reasonably attributed to a relaxation of domestic discipline vested in fathers, mothers, and employers. . . . This liability is necessary to keep the attention of superiors on the alert as regards the conduct of their inferiors, and to enforce the duties of the restraint which they exercise" (Fenet, xiii. p. 488).

Dr. Willems, examining this question, agrees with this view, and remarks that the fact that an employé has acted against orders is merely evidence that his master has not kept him sufficiently under control (*Sur la responsabilité civile*, p. 137).

This second view appears to be the one now almost universally accepted by the Courts, though it is at times confused with or given in addition to the former.

II. Does the liability exist where the workman engaged is

un ouvrier d'une profession déterminée, and engaged for the special work of this profession ?

To this question again different answers are given. Some of the writers just cited, as Sourdat and Dalloz, urge that the employer is not liable in such cases, as he has no right of directing the work. Larombière and Willems are of the opposite opinion. The latter writer urges that his view is more conformable to the general interest, for if the master could thus free himself from liability, nearly all cases of liability disappear, and it would be the rich who in nearly all cases would profit by the situation. Larombière's theory, he urges, is preferable and justifiable, practically and legally. A choice of a workman is after all a choice of an inferior by a superior, who, at least theoretically, can give instructions to his servant, and the right of giving directions is no more illusory than the right of choice. The case is different with a contractor, both parties are on an equal footing. It is, however, impossible to lay down a hard and fast rule where specially skilled workmen are employed for special work, each case must be judged by its own circumstances. A contractor, however, takes on himself all liability, unless his employer specifically retains the right of surveillance (Willems, pp. 137-39).

Laurent agrees with this opinion, and in the main it is the view of the Courts. When servants are chosen by another servant for his master, "*en vertu d'une délégation spéciale émanée de lui*," they are the master's servants, and he answers for their acts as if he himself personally engaged them (Cour de Cass., 5th November, 1855; Sirey, vol. ii. p. 222).

"The responsibility to which Article 1384 subjects employers does not depend alone on their having chosen their servants," said the Court in 1847, "but it supposes, besides this, that they have the right of giving orders as to the manner in which they shall fulfil the functions for which they were employed, *and without this authority they are not true employers*" (Sirey, 1847, i. 855).

III. The Article states that the liability of masters and employers for their servants exists, "*dans les fonctions auxquelles ils les ont employés.*"

The cases cited on the "scope of employment" are very similar to those so well known in England, such as *Limpus v. London General Omnibus Company* (1 H. and C. 526); *Whatman v. Pearson* (L.R. 3 C.P. 422); *Storey v. Ashton* (L.R. 4 Q.B. 476).

A few instances will suffice. The agents of an insurance company published defamatory matter on another company. The company was held liable for the acts of their agent, even though, as was shown, they had forbidden the publication. Domat had included fraud (*dol*) amongst the wrongs for which a master had to answer, and this case was decided in accordance with his view, "*Il suffit que les fautes des préposés se rattacher à l'objet de leur mandat et aient eu lieu à l'occasion de son exécution pour que les commettants soient responsables*" (compare *Barwick v. English Joint-Stock Company*, L.R. 2 Ex. 259).

In another case some men, employed by a miller, broke down a sluice to get water for the mill, and the miller was held liable for their act.

A case combining features somewhat similar to *Whatman v. Pearson* and *Storey v. Ashton*, came before the Rouen Court in 1837. A carter was seen by an official of the octroi riding on his cart contrary to the regulations. He was told to dismount, he refused, and the octroi official thereupon pulled him out of his cart. On this a fight ensued, and a second carter who was passing came to the assistance of the first. The octroi official, being seriously injured, brought an action against the masters of both carters. He recovered only against the first, who was held to have done the wrong in the exercise of the functions for which he was employed; whilst the latter, by leaving his cart and joining in the fight, was held to have quitted his master's employ (Laurent, vol. xx. p. 620).

When the servant is acting within the scope of his

employment, and when he is not, is always a question of fact, and there is, it is urged, no necessity to impose on the judge any presumption of which the law knows nothing. However a presumption is raised by the *Cour de Cassation*, that a domestic servant in the house of his master is always under the master's authority as regards the functions to which he is employed (30th August, 1860, Sirey, ii. 222). This presumption is not universally admitted (Willems, p. 143).

On the other hand, some Courts go the length of holding the master liable for acts which are clearly outside the scope of the servant's employment. For example, the master was held liable for a rape committed by his coachman on a girl who had been put into his charge to be driven to school, though the reason given certainly sounds curious "*parceque l'attentat avait eu lieu à l'occasion de l'exercice de ses fonctions!*" (Laurent, vol. xx. p. 584). In another case, a gamekeeper committed a murder, and the masters were held liable for damages for the act. There were, however, special circumstances in this case. The servant was known to his masters to be of somewhat feeble intellect, and they also knew "*de ses habitudes d'ivresse et la surexcitation d'esprit ou il se trouvait,*" and, knowing this, they still kept him in their service (Paris, 19th May, 1874, Sirey, ii. 222).

IV. The Article in its terms lays down an absolute rule, the editors say it is "*la plus entière et la moins équivoque.*" The Court of Brussels, and French law generally, however, limit the responsibility in the following ways:—

1. To cases which no human foresight could anticipate, hereby incorporating an important exception, which has been used with much effect in cases of accidents, where the cause was held to be beyond the master's control (Willems, p. 142).

2. Another limitation of the *presumptio juris et de jure* arises from the fact that there is no liability in case of absence of blame on the part of the "*chef du préposé.*" The injured person must prove the injury against the actual

wrong-doer, the presumption is only against the master (Willems, p. 142).

3. The third limitation arises from the express words of the Article—the master is only liable for his servant's wrongs done in the course of his employment. With this we have already sufficiently dealt.

In order to succeed in an action under Art. 1384 the plaintiff therefore has to prove—(1) the injury; (2) the damage; (3) that the person causing the injury was a servant of the defendant; and (4) that the injury was committed by him in the exercise of the functions for which he had been employed. The master can defend successfully only by proving a direct negative, or by showing that the defendant was himself the real author of his own injury (contributory negligence), or that the injury was caused by circumstances beyond human control (act of God).

V. It may be as well to recapitulate and examine the reasons adduced for the existence of this absolute liability.

1. Pothier and Laurent contend for the necessity of the rule, in order that masters may be rendered careful in the choice of their subordinates. It is useless they urge to allow the master to show he has exercised due care, his *culpa in eligendo* is clearly proved by the occurrence of the evil. Laurent, however, concedes that the freedom of choice of masters is limited, and in many cases illusory, and experience shows that servants will commit wrongs in the best regulated establishments, and after the utmost care has been exerted.

2. Connected with this view is the statement in the "Rapport" before cited, that the liability is due to the fact that the master employs the servant for his own profit, he must, therefore, also be responsible for any losses the servant may produce.

3. M. Pirmez, whilst admitting the absolute presumption, combats the reasons given by many advocates of the view, and advances the following: "When the master is replaced by an agent, he gets him to do certain things which he ought

to do himself. He can only appoint this agent as regards third persons at his own risk. Such third persons have in the existence of this rule the security of the social position and fortune of the master, and he cannot get rid of these by appointing another to act for him" (quoted by Willems, p. 145). The servant is thus treated as an agent to whom a law of agency differing from the ordinary law is to apply. *Qui facit per alium facit per se* is to be used in an extended manner unknown to the general law of agency. This argument excludes all questions of blame on the part of the master, and if carried to its logical conclusion would comprise all cases of delegation.

4. Dr. Willems prefers to base the liability simply on the ground of some blame on the part of the master, but he would allow the master in all cases to rebut the presumption. His argument is that it is just that the master, on whom falls the choice and oversight of his subordinates, should in case of damage done by them be presumed to have been wanting in his duty; he profits by their work, and should look after the workers. But it should be possible for the master to be able to free himself from this liability, as no one should be rendered liable for the consequences of an act to which he is a stranger, "*au point de vue de la faute*" (Willems, p. 147). This view is adopted by the new German Code (Art. 831), the Spanish Code (Art. 1903), and the Swiss Code (Art. 62); it is also advocated by the third section of the Belgian Commission of revision. The Dutch Code (Art. 1403), and the Italian Code (Art. 1153), both preserve the absolute liability of the Code Civil.

A word on the Swiss Code of 1881 may not be out of place here. It was proposed to enact the absolute rule of the French law, but instead the old German view of *culpa in eligendo* was adopted, modified by shifting the burden of proof, Articles 61 and 62 which are concerned with the subject avoid all reference to the principle.

Article 61 is as follows: "Whoever is legally bound to exercise control over a person is responsible for the injuries

committed by him in so far as he cannot show that he has observed requisite care in his surveillance, under the circumstances."

Article 62 provides that "a contractor is responsible for the injuries which his foremen or workmen have committed in the exercise of the functions for which they were employed, if he does not show that he has used all requisite care to avoid such injury. This liability falls on juristic persons if they carry on business."

A comparison of these Articles with Article 831 of the new German Code is not without interest (see page 31).

Part II.

CHAPTER I.

THE LIABILITY OF MASTERS FOR WRONGS OF THEIR SERVANTS TO FELLOW-SERVANTS.

“**T**HE workman was almost entirely forgotten in our civil code,” says Dr. Emile Stocquart, and not only was this so as regards France and Belgium, but the codes of Prussia and Austria were little better off in this respect.

The invention of steam-power, the introduction of the factory system, have combined to bring about a complete revolution in the industrial world. The law has not been prepared to take cognisance of these altered circumstances, and in France, Belgium, and some other Continental countries, not to speak of England, the struggle for legislation on behalf of the workman is by no means at an end. In other States, however, the interference with the freedom of contract goes a considerable way towards establishing a socialistic régime. The limitation of hours of labour, the compulsory insurance of workmen, both against accidents and against sickness, have not only supplied what was lacking in the codes, but have gone much beyond them. The German laws have marshalled the workmen in their social life in much the same way as they are arrayed in their military. On all sides there is evidence of a feeling in favour of increasing the responsibility of the master, and of forcing him to remember that his workmen differ in important respects from the machinery which they superintend.

In England the doctrine of common employment has worked very inequitably, and we see the results of the growing conviction that more must be done by the State for the working-classes than will be done for them by the enlightened self-interest of the employers. The passing of the Factory Acts, the attempted limitation of hours of labour in shops, the Artizans' Dwelling Acts, the Employers' Liability Act, the Workmen's Compensation Act, 1897, and especially the enforcement by the local authorities, of the requirements of sanitation and water supply under the Public Health Acts, have shown that the wave of feeling on the Continent has spread also in some measure over England. We have in fact been engaged, and are for some time likely to be engaged, in the difficult task of constructive legislation, as opposed to the destructive legislation of the early Victorian era.

One of the chief causes of this movement appears to be the great increase in the number of joint-stock companies. On the Continent, as in England, one of the great features of the industrial system of the last thirty years has been the enormous growth of this system of production. Formerly, men and masters lived near to each other, and were more or less acquainted. The men's interests were to a great extent the master's, and generally where this was, and is, the case, the interest of the master is safe in his employés' hands. But this has in the main been changed. The master has disappeared, he has become dissolved into the innumerable shareholders of joint-stock companies who never associate with the receipt of their dividends any responsibility for the men by whom those dividends are earned.(a) The growth of these companies has produced a decreasing sense of personal responsibility in the employers, whilst the growth of socialistic ideas which, on the Continent, has been of increasing importance, has fixed the attention of the public on this subject in a manner which necessarily resulted in the law

(a) See Speech of Mr. A. J. Balfour at Cambridge, 10th November, 1896.

being made more favourable to the employés. The whole question has become social rather than legal, and the solution of the problem by means of insurance takes it out of the hands of the lawyers and transfers it to Government officials. This is not entirely true, as in cases not provided for by these laws, the injured workman is still to have recourse to his action under the code.

Continental legislation has in many respects abandoned the path of scientific development, and entirely new methods are in use. The examination of this legislation and of the preliminary discussion is an interesting study in the psychology of nations. This discussion has long ceased to be confined to lawyers, but it is with the legal aspect of the questions that we are concerned, though the social side cannot be ignored. Germany and Austria have dealt with the matter by legislation during the past fifteen years, and in France, Belgium, Holland, Sweden, and Norway, measures have been, or are, under discussion on this subject.

In Germany the accident insurance legislation has introduced an entirely novel principle into the law. This new conception is not the work of lawyers, but of the economists, such as Schaeffle and Wagner, and it is impossible to consider the subject of employers' liability apart from the wider one of insurance, at any rate as regards Germany and Austria. It hardly need be said that there is a vast difference of opinion on the question of the direct intervention of the State in this matter. On the one hand, it is contended that only the individual interest of employer and employed ought to provide for precautions being taken to avoid accidents, and that, if any such occur, the injured person should be left to his remedies under the common law. Class legislation must be avoided, says this school. On the other hand, it is urged that there are many dangers inherent to work, which can never be completely avoided. An enquiry made in 1889 by the German *Reichsversicherungsamt* shows that out of 15,970 serious accidents which happened in Germany in 1887, and

which caused total incapacity for more than three months, 6931—i.e., 43·4 per cent.—were due solely to professional risks which were inevitable.(a) The State therefore (so this school contends) should take means to provide for the reparation to the injured workman for injury suffered by a cause which he could not control, and so provide him with the means of obtaining as a right, and not as a charity, that help which is indispensable to him.(b) Within those two schools are all shades of opinion, and many writers on both sides shrink from the carrying out of their principles to their logical conclusions. Leaving out of account the writers of the strict laissez-faire school, who are but few in number, there appears to be a fairly unanimous feeling in favour of taking some additional steps to protect the workman. The problem cannot be said to be entirely solved in Germany and Austria, though in both countries, as regards life and limb, the workman is better protected than elsewhere in the world, as far as law can protect him. Whether he is actually better off than many employés in large concerns in England is a question which it is difficult to answer.

The means which have been suggested for coping with this matter are sketched in the following chapter.

Three methods have been advocated or attempted on the Continent as means for solving the problems of employers' liability—viz., (1) the inversion of proof; (2) professional risk, with which is connected (3) insurance.

(1.) *The Inversion of Proof.*

It has already been seen that the new German Code has adopted the first method in dealing with the question of master's liability as regards third persons, and this has been

(a) The other figures are, 3156 accidents due to the master's fault (19·76 %); 4094 due to the workman's fault (25·6 %); 711 due to the fault of both (4·45 %); 524 due to fellow-workmen or third persons (3·28 %); 554 due to unknown causes (3·47 %).

(b) Attention is called elsewhere to the variation in the figures given. The German estimate appears an average. The French is put as high as 75 %; the Italian as low as 10 %. Sir J. Gorst puts the figures at 75 %, and Mr. Chamberlain at 80 %, in England.

advocated with much force by M. Charles Saintelette (a former Belgium Minister of State) for France and Belgium, in dealing with the master's liability for injuries to his workmen.

In examining the principles which ought to govern the relation of master to servant as the result of the contract of service, numerous decisions of the Courts of France, Belgium, Austria, and Germany may be cited which show that there is a consensus of judicial opinion to the following effect: that masters must take due care to protect workmen against the dangers consequent on their work, and that the master must indemnify the workmen against evils which happen from the execution of his orders and from using his appliances. These principles are stated in broad and general terms, as will be seen on reference to the judgments quoted (see *De la responsabilité*, pp. 142, 143).

The question arises, whence springs this obligation? is it from the contract of service or from Article 1382, and other Articles of the Code?—i.e., is the obligation contractual or delictual or quasi-delictual?

(1.) *Does the liability spring from contract?* Then it is governed in the countries of the Code Civil by Tit. iii. of Book iii., "*Des Contrats ou des obligations conventionnelles*," and not by Tit. iv. of the same book, "*Des engagements qui se forment sans convention*." If the obligation is contractual, it is for the defendant to prove that he has fulfilled his share of the agreement; if delictual or quasi-delictual, it is for the plaintiff to prove his ground of action.

The contention of M. Saintelette is that the obligation springs from contract. This opinion, he admits, is contrary to the decisions of the Courts, but he urges that it is justified by numerous arguments of which the gist may be stated as follows. The contract of service is a contract whereby one person agrees to obey the commands of another, to do certain work with certain tools in a certain way, and generally to submit to the exercise of authority and surveillance by the master; in return for this the servant has the right of receiv-

ing a fixed wage, and of being indemnified from evil in the course of the work. The master must see to his being preserved safe and sound, must in fact guarantee his safety. The defenders of this position both in France and Belgium have been very numerous. It is supported by M. Labbé, by M. Demangeat, a celebrated Roman lawyer, M. Cobelle, and M. Glasson; the latter, however, contends that the workmen must show that the master has not carried out his contract, and there are a few isolated decisions in this sense, notably one of the Court of Ghent of 18th June, 1887.

In France, M. Marc Sauzet, working independently of M. Saintelette, has arrived at similar conclusions. He defines the obligation which the contract of service imposes on the master as "to take all proper measures to safeguard the health and life of the workman." This is a general definition of the position. He proceeds in a note to enter into greater detail. "*Le patron doit veiller à la sécurité de l'ouvrier, c'est à dire, qu'il doit le conserver sain et sauf au cours de l'exécution du travail dangereux qu'il lui confie et qu'il dirige: il doit à chaque instant pourvoir le restituer, le rendre à lui-même valide, comme il l'a reçu*" (Saintelette, p. 141).

M. Sauzet claims that his definition is based on judicial decisions, of which he quotes several, and M. Saintelette adds to the number. The decisions do not, however, lay down the rule that the obligation to compensate a workman for injuries received in his employ springs from this source; they only show that judges are in agreement as to the care which should be taken of the workman. On the contrary, the mass of decisions is the other way.

(2.) *Does the liability spring from tort?* On the other side, those who contend that the obligation must spring from a "*faute*," have on their side a long chain of judicial decisions and the recognised practice of nearly a century. It is urged that to create a legal presumption that the master is in fault (if he does not prove an accident or fault of the injured person) is to expose to the risk of paying damages

one who does not owe them ; it must in practice lead frequently to injustice. It may have the advantage of utility from the social point of view, as is admitted by some of its opponents, but it can never be justified as derived from exact justice (Saintelette, *De la responsabilité et de la garantie*, Chapter iv., and *Des Accidents de Travail*).

If the basis be a delictual one, it follows that a workman to succeed must prove—(1) the injury ; (2) damages ; (3) a fault on the part of the master which, under Articles 1382 and 1383, may take the form of negligence or imprudence. If the action is brought under Article 1384 for direct injury by one servant to another, the strict wording of the Article would suggest that proof of (1) and (2) would suffice, but here the decisions are very conflicting (Sirey, ii. p. 224).

It is contended by M. Laurent^(a) that the proof of the injury and damages raises a presumption of blame which it is for the master to rebut. M. Prosper Staes (*Des Accidents de Travail, Journal des Tribunaux (Belges)*, 1886, p. 783) agrees with this view. The Courts, however, have with one or two exceptions decided against it, and when the action has been based on Articles 1382 or 1383, it appears that this decision is perfectly sound. But an action by a servant under Article 1384, it is submitted, should not be treated differently from that of a stranger. The words of the Article are very definite and clear, and M. Laurent's contention appears to contain much justice ; however, here the decisions are against him. Articles 1382, 1383, and 1384 are as follows :—

Art. 1382.—Any action whatever of a man which causes an injury to another, obliges the person by whose fault the injury has occurred to repair it.

Art. 1383.—Every one is responsible for the injury he has caused, not only by his action, but also by his negligence and imprudence.

(a) "Les principes des droits civil," vol. xx. p. 639.

Art. 1384. — A man is responsible, not only for the injury he causes by his own action, but also for that which is caused by the action of persons for whom he ought to answer, or of things in his charge. The father, or the mother after the decease of the husband, is responsible for the injury caused by their children who live with them, being minors; masters and employers for the injuries caused by their servants and foremen (*préposés*) in the performance of the functions in which they have employed them; tutors and tradesmen for the injury caused by their pupils or apprentices during the time they are under their supervision. This responsibility is incurred unless the father, mother, tutors, or artisans prove that they could not prevent the action which gives rise to the responsibility.

There are two cases treated by M. Sainctelette in which the facts were almost identical, though the decisions were quite different. A boiler explosion occurred in a laundry in Paris in 1867, whereby one of the laundresses was seriously injured. She sued the owner (her master) for damages, but was unsuccessful. The case was heard on appeal, and judgment was affirmed: the reasons given being that in an action under Articles 1382 or 1383 the existence of a fault, legally imputable, constitutes one of the essential conditions to an action of responsibility. The appellant was unable to prove any negligence on the part of the respondent, and therefore the appeal failed. Neither under these two Articles, nor under Article 1384, was the respondent liable, as there was no attempt to affix blame to one of his servants.

In 1872 a similar, though more serious accident, happened in Brussels. Five persons were killed at once, and seven subsequently succumbed to their injuries. Proceedings were taken against the laundry company, and judgment was given against them in the Court of first

instance, and confirmed on appeal. In this case, however, the decision was based on Article 1384, and in the first Court was shortly as follows :—The owner of a thing, even an inanimate thing, which is under his charge, must answer for any damage caused by it. It is only natural and logical that a person who has the right and duty of supervision and direction, should be legally presumed to be in fault from the instant when the thing has caused any damage. The laundry company ought, therefore, to have proved that they could not have prevented the explosion, in other words, should have been compelled to prove a negative. The Court of Appeal, whilst affirming the judgment of the Court below, rejected this reasoning. Their judgment is as follows :—Whereas by Articles 1382 and 1383 a person who causes damage to another by his negligence or imprudence is liable to make it good, and, therefore, the plaintiff must prove the existence of a fault. And whereas Article 1384 does not derogate from this principle in anything that concerns his responsibility for things under his control, it follows that the appellant must prove that the respondent was to blame. Therefore, since the report of the inspector who was appointed to investigate the cause of the explosion, does not report that the accident was caused by *force majeure*, or accident, or that the deceased in any way contributed to it by her own imprudence ; therefore, these considerations show that the appellant is liable to the respondent for damages caused by the explosion, and the appeal was dismissed.

So, by this curiously fallacious process, the husband of the deceased washerwoman recovered damages by inverting the burden of proof in a quasi-delictual action. "From these two cases," says M. Sainctelette, "you get this result: the Court of Paris, by strict adherence to the rules of evidence under the Articles in question, produces an inequitable result ; whilst the Court of Brussels, in order that justice might be done, violates these rules in the plainest manner. Truly hard cases make bad law." If, argues

M. Sainctelette, both Courts had, instead, read into the contract of service the implied conditions for whose existence he and M. Sauzet contend, there would have been no necessity either for the inequitable result in the first case, or the fallacious argument in the second. The plaintiff, suing in contract, would have proved the contract and the breach, leaving the defendant to defend as best he might (Sainctelette, 145-151). I can only say again, that neither the decisions of the French or Belgian Courts will justify this contention.

(2.) *Professional Risk.*

Accidents, said to be due to professional risk, in the Report on the German Accident Insurance Law, doubtless include many cases which in England would have come under one of the sections of the Employers' Liability Act, 1880. Professional risk has been defined as "a permanent cause of danger, independent of measures of security which can be taken, and which are connected with the nature of the industry which is carried on, or the sum of the accidents which happen fatally in any professions, independent of the fault of men, workmen or masters" (M. Tolain, *Chambre des Députés*, "*Doc. Parl. Off.*," 1885, No. 395, p. 397, col. 2; Dr. Emile Stocquart, "*Contrat de Travail*," p. 111).

Another definition, given by a practical engineer (M. Cheysson), is also worth quoting in this connection. "Professional risk is the risk affecting a determined profession, independently of the fault of the masters and their workmen. In spite of precautions taken, it constantly produces accidents, the greater number of which are attributable to nobody's fault. It is by a humane fiction that the Courts exercise their ingenuity in finding a fault, in creating one where none exists, in order to indemnify the victims. From the moment when inevitable risks are inherent to labour, the workmen ought not to have to bear them, to-day less than ever, in the presence of modern appliances and of the forces which set them in motion. When the navvy works with his spade or pick, or the

butcher with his knife, the tool in his hands is only a continuation of his limbs, and he can, strictly speaking, be held answerable for them. But how different is his position face to face with a great furnace, a boiler, a rolling-mill, with molten metals, with irresistible forces, the slightest contact with which is fatal" (*Journal des Économistes*, 15th March, 1880).

This extract was quoted by M. Tolain in the speech above referred to. This speech was in defence of one of the measures introduced into the French legislature before the introduction of the Insurance Bill. Professional risk appears to be a term used largely to cover cases of injuries which occur under circumstances not closely enquired into, and the causes of which are not really known because never scientifically examined.

The evil is greater, the wrong more considerable, according to M. Cheysson, if the motive power is steam or mechanical; and so in the draft of the law introduced by the Chamber of Deputies, a list of trades was drawn up in all of which the motive power was mechanical (*moteur mécanique*); and in the accidents happening in them, and in them only, was the master to be absolutely bound to make compensation. This draft was rejected by the Senate who proposed to enact that in every work or industry which was recognised as dangerous, the master (*chef de l'entreprise*) should be held liable for all accidents to workmen in their work, unless it was proved that the workman is himself to blame. This appears still to be the point in dispute.

The idea of professional risk is one of the expedients used for enforcing alteration in the laws of the various continental States. The alterations have in all cases been the result of political agitation. It is easy to say that seventy-five per cent. of accidents happen as a result of circumstances over which the workman has no control, but it is much harder to prove it. It is recognised that there is a greater risk in some trades than in others; but to assume it as a basis of legislation instead of, or without an insurance system, appears to have

been unsatisfactory. The master is exposed to the danger of paying ruinous compensation; and the workmen get careless.

The idea of the professional risk, it is urged, is anti-juridical and unscientific; the cause of the accident is the profession or business; businesses vary in degrees of danger, so if the injury is suffered in a factory there is professional risk, the profession (*i.e.*, the master) ought to answer for it; but if the injury is suffered by a farm labourer, by non-mechanical means, the cause may be ascertained and the master will probably not be liable.

Switzerland tried the doctrine of professional risk without supplementing it by an insurance scheme. By a law of 25th June, 1881, the master was rendered liable absolutely for the death or injury of his servant, if caused in his factory or in the carrying on of his business. A referendum, however, was demanded, and by 283,000 out of 290,000 votes it was decided to establish obligatory insurance. The doctrine of professional risk, apart from insurance, was found impracticable. The legislation in Germany and Austria is based entirely on this principle of professional risk, as modified by insurance. The subject, then, of the master's liability for wrongs of his servants in those countries, is so completely interwoven with other matters that it is impossible to avoid treating them all together, though in sketching the history of the legislation, and the enactments in force before the now existing statutes, they will as far as possible be kept separate.

(3.) *Insurance.*

Up to the present only Germany and Austria have a system of compulsory insurance against accidents in force, but in several other European countries the subject has for some time been under discussion, and in France, Sweden, and Belgium attempts have been made to introduce somewhat similar systems. This subject has received most thoughtful treatment by Dr. Emile Stocquart, and the following is a summary of his remarks hereon (*Le Contrat de travail*, pp. 114-120).

The necessity of compulsory insurance is by no means universally accepted; and, even amongst those who accept the principle, great differences of opinion exist. The chief point in dispute is whether the State should be the insurer, or whether it should confine itself to commanding insurance and seeing to its orders being carried out.

1. The inconveniences of *insurance by the State* may be summarised as follows:—

- (1.) The principle contained in such laws as those of Germany necessitates a reconstitution of old corporations.
- (2.) It would result in an excessive system of bureaucracy.
- (3.) It constitutes a bad precedent in interfering with contract. If this is allowed, where is it to stop? If it is reasonable to allow the State to insure or compel the insurance of workmen, why not extend it to life insurance and fire insurance?

This objection of Dr. Stocquart is very interesting in the light of the following extract from *La Gazette* of 15th January, 1897:—

SERVICE COMMUNAL D'ASSURANCES CONTRE L'INCENDIE.—*L'administration communale de Schaerbeek élabore en ce moment un projet d'organisation d'un service communal d'assurances contre l'incendie, projet qui ne constituera pas seulement une innovation hardie, mais fera grand bruit dans le monde des assurances.*

Les édiles schaerbeekois se proposent de rendre l'assurance indirectement obligatoire, en frappant d'une taxe de un ou deux francs les habitants qui ne se feraient pas assurer à la commune. Cette partie du projet provoquera vraisemblablement des mécontentements assez vifs parmi les personnes qui tiendraient, pour

des raisons personnelles ou toutes autres, à se faire assurer aux Compagnies d'assurances.

D'autre part, nous apprenons qu'un autre projet—connexe du précédent—tendant à communaliser entièrement le corps de pompiers qui a été fondé, comme on sait sous l'impulsion de l'initiative privée, est également mis à l'étude. Ce second projet permettrait d'établir, à des endroits déterminés, des postes fixes.

L'administration communale s'est décidée à élaborer ce double projet à la suite du refus persistant des Sociétés d'assurances d'accorder des subsides au corps de sapeurs-pompiers.

- (4.) There is no security for the workmen in case the insurance corporation disappears.
- (5.) To secure the observance of the law, a strict system of inspection will be necessary, and employers of labour will have their independence greatly interfered with.
- (6.) The inconveniences would be most grave to the workman. If the workman changed his service, he would have to take his certificate to show he entered such an employ on such a date, and was insured at such a date, and that the insurance is in force at the time he enters the new employ, &c.

2. *Obligatory insurance*, a middle term, has also numerous adversaries.

- (1.) It is contrary to the principle of insurance, which is from its nature an eventual contract (*contrat aléatoire*) to provide against accidents produced by chance, and whose injurious effects are proportioned to their number. Their practical conditions imply for the insurer a capability of appreciating, of classifying each kind of risk, with an estimation of the separate character of each, according to which the premium is cal-

culated. The necessity for this selection results in this, that in similar industries conditions of superintendence, preventive measures, conditions of the plant are met with which absolutely necessitate different treatment. The premiums determined by each risk, and grouped by the association, lead to distribution of the risks according to their frequency. The impossibility of calculating a risk or its excessive gravity may exclude the possibility of insurance, for instance the risk of a workman in a dynamite factory. Obligatory insurance prevents each risk from being calculated singly, and treated according to its gravity.

- (2.) It leads sooner or later to insurance by the State, with all the inquisitorial proceedings which accompany such interference. If the legislator compels the master to insure, it ought to provide the means particularly for insuring against extraordinary risks.
- (3.) It produces carelessness on the part of both masters and men, in other words there is a complete destruction of individual responsibility. In fact it would not be insurance at all, but obligatory assistance by way of solid obligatory guarantee under the form of insurance.
- (4.) If the master has the choice of companies he would naturally take that with the smallest premiums. But suppose this company, having drawn the premiums for a number of years, then fails, what will the position of affairs be? Will the workmen who had suffered injury, and are entitled to compensation, be able to claim it from the master, who has already made provision for them by insuring in an office which, owing to no fault of his own, has

disappeared? But it may be said the companies will be chosen and superintended by the State. In that case the State ought to point out those in which insurance can be effected without risk, and to proscribe all those that they cannot recommend. Favouritism will thus soon spring up. The State has an interest in recommending one company rather than another.

- (5.) The workman would have to deal directly with the company, which would frequently be a difficult and expensive matter.

3. The third form of insurance is that of *obligatory insurance for certain industries particularly dangerous*. On behalf of this scheme which Dr. Stocquart advocates, he advances the following reasons:—

- (1.) It is incorrect to say that compulsion destroys the character of insurance. It may easily be shown from the code civil that the principle is by no means new. Hypothec is a civil contract demanding the free and voluntary consent of two persons. But in certain cases the law imposes an hypothec without the consent of the parties—*e.g.*, in the case of a wife over her husband's goods. Similarly in the case of minors and persons interdicted, there is an implied hypothec over the property of the tutor.

The law protects wives, infants, and persons interdicted against possible malversations of persons under whose care they find themselves, why should it not as effectively protect another possible victim as worthy of interest and pity? "*Un ouvrier modèle, sobre, honnête, est gravement blessé au service de son patron. Le législateur a non seulement le droit, mais encore le devoir d'intervenir pour garantir la victime de l'accident contre le mauvais vouloir ou*

l'insolvabilité de la personne responsable"
(Stocquart, p. 119).

- (2.) The argument that it is impossible to proportion risks to their number, as one of the essential conditions of insurance has been greatly exaggerated. It only applies to those industries which are particularly dangerous. In fact, the only result would be to increase the premiums.
- (3.) Accidents which happen in the course of dangerous industries ought to compel the State to intervene and act as insurer. This intervention would not destroy the character of insurance, as most of the accidents are due to chance or inexplicable circumstances, and so are matters for insurance. Moreover, it appertains to the duty of the State to interfere in such cases, for it only can properly protect the workman, it disposes of all the resources of the social capital.
- (4.) Such considerations as the danger of particular industries, the number of the victims and the interest of the public have determined numerous jurists to call on the state to insure workmen and employés in the following undertakings:—
 - (a.) In quarries, mines, and other subterranean works.
 - (b.) In railways and navigations (internal or maritime).
 - (c.) In works, factories, yards, and other undertakings where machinery is used, driven by steam, gas, electricity, &c.
 - (d.) In works employed in the production of explosive materials.

In conclusion, Dr. Stocquart is of opinion that the ideal would be a system of "*caisses de secours libres*" adopted by each industry, under a law of responsibility which indirectly made insurance necessary but not compulsory. Manufacturers and merchants would find it to their interest to belong

to the "Caisse" of their industry, which would be powerfully organised.

It need hardly be said that I am not concerned with defending or advocating any of the schemes above suggested. The inversion of proof theory would, according to its advocates, apply to all cases of injury to servants, no matter what is the nature of their employ; it would be a great advantage to the injured person, and would not impose an undue burden on the master. The doctrine of professional risk renders the master absolutely liable in case of injury caused to workmen in certain trades and not in others, thereby, as its opponents contend, creating an unjust distinction. The case of insurance is different from these. In Germany and Austria it has been tried, and is still at work. The lines on which the insurance laws of these countries are drawn are, however, those of obligatory insurance, by corporations of employers. The corporation in Germany is composed of all the employers in a particular trade in the whole empire; in Austria it is localised.

The objections to insurance in general may, of course, be urged against both schemes, and that they are not perfect and do not in all respects fulfil their expectations their most ardent advocates will admit. Their weaknesses are referred to more particularly under a discussion of the laws, from which their advantages may also appear.

Note.—The writer desires to acknowledge the help he has derived from Dr. Emile Stocquart's "Contrat de Travail," and at the same time to thank Dr. Stocquart for much valuable assistance and advice.

CHAPTER II.

COUNTRIES GOVERNED BY THE CODE CIVIL.

ARTICLES 1382-84, which have already been quoted in connection with the first part of the subject of Employers' Liability, do not in so many words give a workman who has been injured in his employment any special redress. Workmen and the general public are, in countries governed by the Code Civil, on the same footing; these countries know nothing of a doctrine of "common employment."

If an injured person whether servant or otherwise, can show (*apporter judiciairement la preuve*) that blame is imputable to the defendant personally, or to those for whom he is under these Articles responsible, or to things under his care he can recover damages.

The master is liable for all his workmen without distinction; there are no classes amongst them. Of this responsibility he can never absolutely relieve himself or be relieved, but when the injury is caused by a fellow-workman it lies with the judge to estimate the acts absolutely, and to assign to each person his share of the responsibility. If the injured workman is under the authority of another workman, or in any position of authority in the employer's business, the rule is still the same, the case being governed by the Articles of the Code referred to.

The responsibility of the master is the same whether the machinery, plant, and permanent appliances, or whether the acts of the workmen or their defaults, are in question. The amount of responsibility is always settled by the judge.

Under the Code, contracting out is allowed, but the judges

have the power to cancel any such contracts if they are of opinion that they are too prejudicial to one of the parties.

That the burden of proof is on the injured workman was clearly laid down in a case before referred to, before the *Cour de Cassation*, on 17th July, 1870 : " Since the existence of a legally imputable fault constitutes one of the essential conditions of an action of responsibility, he who alleges that he has been injured by a delict or a quasi-delict is in consequence, and in his character as plaintiff bound to prove it ; in the absence of such proof by him his claim is not established, and should be rejected without the defendant having to prove the fact on which he relies for his defence " (*Dalloz Périodique*, 1890, 561).

The master, it is true, must protect the workman against those dangers which are the natural and necessary consequence of the work in which he is engaged, and if the servant is a child or young person it is recognised that the work which he is given to do must not only be harmless in itself, but it must be done in surroundings where he is sheltered from all risk of accident by machinery in the works (Sirey, 1882, 2, 136).

" It is a principle," says the Court at Besançon, " according to common law that the company (railway company), in employing its agents in operations which are often difficult and perilous should assure their safety, and it should even, if occasion offer, seek to protect its employés against their own unskilfulness or personal omissions." " The employer has a strict obligation," said the Court of Dijon, in 1877, " to protect the workmen against the damages consequent on the work, and this obligation entails the necessity of foreseeing even possible accidents, and taking measures which are of a nature to obviate them." (a) (See Article by M. Marc

(a) A case decided at Bordeaux, on 19th August, 1878, suggests comparison with the well-known case of *Dixon v. Bell* (5 M. and S. 198). An employer left certain dangerous tools about in his office, and after office hours some boys in playing with them were seriously injured. The master was held liable for the injury thus caused, under Arts. 1382 and 1383 for negligence, the Court holding that where infants were employed special care must be taken to provide for their safety (Sirey, vol. ii. 198).

Sauzet, *Rev. Critique de législation*, 1883, pp. 615-16).

Similar statements may be found in decisions of the Courts of Rouen (1866), and Liège (1887, 1889). (*Sée Saintelette, Les Accidents du Travail*, and generally Part i. chap. 4, *ante*).

Even if the workman is to blame, that does not free the master entirely. If it is shown that he too is in fault, it has the effect only of reducing the amount of damages which the Court will award (*Rejet*, 8th February, 1875; Sirey, 1875, i. 204).

In a case decided in April, 1887, the *Cour de Cassation* effected a most important change which, if generally acted upon, would be more favourable to the workman. The facts were as follows :—

A workman was killed by the breaking of a fly-wheel in the works of *la Société de la Providence* at Hautmont. The widow claimed an examination of the works by a body of experts to ascertain if the *Société* ought not to be held liable either by reason of the fault of one of its foremen, or by defect in the machinery (*vice de construction*). This claim was rejected by the Court of First Instance, and by the Court of Appeal, but the *Cour de Cassation* reversed those judgments, and decided that the victim of injury caused by the breaking of the wheel is only bound to prove a defect in the machinery, and she need not prove any further blame on the part of the employer to show how this defect was produced (Sirey, 1887, i. 521, and notes; Stocquart, p. 121).

This decision modifies previous cases on this subject, which demanded the further proof of blame on the part of the employer.

Case-law, however, in France and Belgium, does not stand on the same footing as in England, and there was nothing in this decision to compel Courts to follow it under similar circumstances. Nothing but legislation can improve the servants' position, and that legislation will probably not be long in coming.

I. BELGIUM.

The suggested alterations proposed in Belgium take the form of either—

(1.) The inversion of the burden of proof, as advocated by M. Sainctelette and others; or

(2.) The replacing of the individual liability of the master by the responsibility of an insurance society, which should grant compensation to the injured persons whatever might have been the cause of the accident, unless it was due to the premeditated act of the workman. The form that the insurance should take is, as has been pointed out, still in dispute. Doubtless the example of Germany and Austria will have much weight in any schemes propounded, as is evident from the measure introduced in the Belgian Chamber.

The following scheme is recommended by a commission appointed by the "*Departement de la justice pour la préparation de l'avant-projet d'une loi destinée à régler les effets du contrat de louage des ouvriers et des domestiques.*"

Any legislation on the subject shall be based on the common law, and not on exceptional laws or other financial expedients. The responsibility of the patron to spring from contract. The engaging of the services of the workmen is the contract, by which they engage themselves to execute a work or perform a service under the authority, direction, and superintendence of a *chef d'industrie* or a master, in return for remuneration to be provided by them.

The employer is bound to take all necessary means as far as possible to prevent the security of the workman from being interfered with during the performance of his work. These measures of precaution should be proportioned to the dangers which the work presents, and the age and degree of skill of the workman.

In case of accident, the injured person will claim compensation for the damage caused, basing his claim on an action of contract.

The master indeed does not guarantee the servant's

security. The contract only obliges him to take all possible steps to attain this result.

The workman will have to prove that there exists a clear relationship between the accident and an omission of the precautions promised by the master.

The *projet de loi* establishes a threefold distinction :—

(1.) Accidents due to omission to take the promised precautions: in this case damages (*dommages intérêts*) are regulated on the general principles of the Code Civil, according to Articles 1149–1151 and 1153–1155.

(2.) Accidents arising from causes foreign to the work or from the fault of the injured person. In this case no reparation is due, but it lies with the master to exonerate himself from blame.

(3.) Accidents springing directly from the work or professional risk. These give rise to an indemnity, the injured person having merely to prove that the accident proceeded from the work. The reparation due under this head is called indemnity (*indemnité*), in contradistinction to damages (*dommages intérêts*) due under the first head.

The system proposed by this draft is to apply to all contracts of service. It is not yet law. (Stocquart, pp. 140–42; see also for text of Bill, *Labour Comm.*, vol. xxxix. p. 207.)

The bill on the whole adopts M. Sainctelette's proposals in establishing the inversion of proof, but it goes further, as it compels the master to bear the result of accidents which are proved to have been caused by unavoidable circumstances, thus embodying a form of the "*risque professionnel*." Before the introduction of the bill, a bill embodying the principles of compulsory insurance was introduced. The principles of the measure are somewhat similar to those proposed in France (see p. 88), except that seven-tenths of the premium are paid by employers; one-tenth from the Bureau de Bienfaisance, from which the workman is entitled to receive assistance, and if no such organisation, the state; the remaining two-tenths by the workman. Another point of

difference is that the insurance body is the associations of employers in the same or similar industries, and there are provisions enabling the employers to insure in any society whatever under certain restrictions.

In addition to these schemes for altering the law, there has been established, by a law of 21st July, 1890, an institution called, "*La Caisse de prévoyance et de secours en faveur des victimes des accidents du travail*," which has been of great service to the working-classes, as in two years it has distributed over 200,000 francs amongst some 6000 persons. This institution started by a grant from the Belgian Parliament in 1890, of the sum of 2,000,000 francs (£80,000), to commemorate the twenty-five years' jubilee of King Leopold II. The funds had increased in three years by nearly half-a-million francs, as the result of private benefactions. The funds are, however, utterly inadequate for the purpose, and the Board of Management has memorialised Parliament to provide for what has become an acknowledged need by legislation and state interference" (Wolff, "Employers' Liability," p. 73).

II. FRANCE.

The subject has in France as in Belgium, received a large amount of consideration by writers both within and without the legal profession.

There are those who deny the necessity or advisability of modifying either legislation or judicial decisions (jurisprudence) on the subject, which they allege work equitably. They contend that all that requires modifying is the procedure, so that judgment may be delivered without delay, and that such cases may have a privileged place in the list.

Others recognise the necessity, and suggest that an alteration should be made in one of the following ways—(1) by defining in an express way the actions for hire of services; (2) by applying to actions on the contract for service the ordinary rules of contracts; (3) by introducing into legislation the obligation for the master to insure his workman against

accidents in his work either (i.) by state insurance, or (ii.) by private insurance under a state guarantee; (4) by modifying by legislation the rule of liability (i.) in a general way, or (ii.) more especially as concerns certain classes of masters and employers (Stocquart, p. 123).

The procedure under the Code has one very serious drawback—viz., that the victims of accidents and their widows and children often have to wait a long time before their claims for compensation are heard, owing to the enormous number of actions; and the circumstances of the claimants are often such that grave injustice is the result of tardy justice.

The victims of such injuries or their representatives who have not the means of going to law can obtain legal assistance on proof of poverty, and in these cases they are provided with counsel, and all steps in the procedure are taken for them free of charge (Law of 22nd Jan., 1851).

In 1881 the French legislature examined several bills on the subject of responsibility for accidents to workmen, and from that date onward numerous measures have been brought before the legislature.

In 1884 a commission was appointed, and in 1888 a *projet de loi* by MM. Carnot and Pierre Legrand was passed by the Chamber of Deputies, while in 1890 another government measure was adopted by the Senate which considerably modified that adopted by the Chamber of Deputies.

The alteration proposed by these various measures was chiefly in the following direction:—(1) in imposing on the employer the obligation to indemnify his workman in case of accidents, even if the master was wholly blameless in the matter; (2) in compelling the master to insure his workman, the latter paying at least a third of the premiums; (3) in determining beforehand the scale of compensation to workmen; (4) in altering the legal procedure so as to avoid delays in payment. The common law in the main was to be the basis of the law as before.

Another commission was appointed to enquire into the measures before referred to, and present a fresh series of bills.

Its report was presented in 1892. The scheme of the commission was adopted by 510 against 6.

The commissioners examined the common law and found that, even with the most favourable construction of the Courts, its provisions were insufficient for the protection of workmen who were wholly under the orders of the head of an establishment or his subordinates. The injured workman could only obtain damages by proving that the injury was caused through the fault imprudence or negligence of his employer or subordinates. They accepted as proved the statement that seventy-five per cent. of all accidents were due to unforeseen chance, or caused by *force majeure*, in which case the workman could obtain no compensation. Only a few of the remaining twenty-five per cent. obtained compensation, owing to the expense, uncertainties, and delays of legal procedure.

The projected law, therefore, has a fourfold aim—(1.) It determines the accidents that give rise to indemnity, and fixes the ratio to the wage paid. (2.) It regulates the competency of the Court for the settlement of the claims. (3.) It organises the modes of compulsory insurance of the employers. (4.) It regulates the payment of pensions and indemnities due to the victims and their representatives. (The full text of the bill which up to the present has not been accepted by the Senate, is contained in Appendix xvi. to the Report on the Labour Question in France. *Report of Labour Comm.*, xxxix., pt. 2, 1893-94).

The measure is to apply to all persons engaged in certain specified industries—*e.g.*, mining, transport, workshops, and factories of all kinds, buildings, &c., where dangerous trades are carried on, or which are worked by other power than hand (Art. 1).

A Government department (*Conseil Supérieur des accidents de travail*) will frame a list of the industries to which this measure applies, assigning to each a coefficient of risk, which is in three degrees.

The principle of the employer's liability for all accidents due to professional risk is recognised and enforced. A work-

man injured is entitled to compensation in every case, unless it is shown that the injury was caused by his own fault (*faute lourde*). No contracting out is allowed.

In order to provide for the compensation due under it, the law provides for a scheme of compulsory insurance by which the state is made responsible in the first place, but its disbursements are recouped by the employers, who are for this purpose divided into local groups. The whole of France is to be divided into these districts (*circonscriptions*), which are generally one or more departments. Each district is to be administered by a Governing Committee (*comité directeur*), subdivided into sections, each of which has a Sectional Committee.

In each district all employers in the specified trades are made collectively liable for compensation due to their workmen. Power is reserved to certain individual employers or syndicates to withdraw from the general arrangement, and to insure their workmen in another manner under specified regulations.

The Sectional Committee is to be paid, and to last for four years. Its duties are to advise the Governing Committee as to the coefficient to be assigned to each separate trade, and as to the bonus (*bonifaction*), amounting in some cases to 30 per cent. upon the contribution of the employer, to be allowed where all due measures for safety are observed in the establishment, as certified by a Government inspector (Art. 61).

The Governing Committee settles the list of all establishments of the various industries within the districts, and assigns to each separate establishment its proper coefficient of risk, and deals with all claims for compensation.

Each employer at the beginning of every year is to make a return to his committee of the number of workmen employed in the past year, the number of days each has worked, and the salary paid by him. After these returns have been sent in, the Governing Committee prepares a list of the establishments of the district showing (1) the class to

which it belongs in the classification issued from the Higher Council (*Conseil Supérieur*) ; (2) its coefficient of risk ; (3) the reduction to be allowed, if any. If several different industries with different coefficients are carried on in the same establishment, each is treated as a separate establishment. The list is then sent to the Mayor of the Commune. Provision is made for objection by masters, and the issue of supplementary lists, &c. The Governing Committee can then issue a list of contributories, together with the contributions of each necessary to provide the total amount of the last year's compensation.

When a workman has been killed, compensation is fixed as follows :—Funeral expenses up to 20 days' pay, but not to exceed 100 fr.; and to be paid within eight days of the accident ; an annuity to widow of 20 per cent. of the annual salary ; an annuity to children up to 40 per cent. of the annual salary (Art. 6).

If the accident results in total disability, the workman receives an annuity of two-thirds of his salary, with a corresponding reduction if the disability is not absolute (Art. 3).

Annual salary means the actual salary received during the year previous to the accident, or which would have been received by a workman in similar circumstances (Art. 11).

In case of accidents involving temporary disability, indemnity is given to provide for medical remedies and half the annual salary, not to exceed 3 fr. 50 c. per day. For the first month the temporary indemnity falls on the individual master, after that on the district (Art. 8).

Heads of establishments may relieve themselves from this obligation by showing that they have founded, or associated with the workmen in founding, special benefit funds which, in addition to treating the injured person, are bound to pay him half his wages up to 3 fr. 50 c. per day (Art. 9). No compensation can be claimed for an accident that only disables for three days.

The compensation when once fixed is liable to alteration at the suit of either party at any time within three years

after the award. It may be increased or decreased according as the injury is more or less serious than was first anticipated.

Workmen whose annual salary is 2000 francs, or less, can only benefit under this law up to that amount (Art. 2), and can only claim under this law (Art. 35); but a workman whose wages are higher may elect to proceed under this law, or may be left to his remedy at common law. If he proceeds at common law there is no limit to the amount he may recover, but the burden of the proof of negligence is on him, the law making no alteration in this respect.

If an action at common law discloses gross negligence in the employer, the district is only to be liable for so much (if any) as shall be necessary to bring up the amount to the amount allowed by the law.

The procedure proposed by this bill is as follows:—An employer must within eight hours (Art. 12), notify an accident to the Mayor of the Commune, and send a medical certificate. If it is serious, or likely to be fatal, the Mayor forwards the notice to the Justice of the Peace (*Juge de Paix*), who within twenty-four hours holds an enquiry, with an expert if necessary, and sends the result to the President du Tribunal Civil de l'Arrondissement (Arts. 13 and 14). The enquiry must be concluded in ten days (Art. 15).

Temporary indemnities are settled by the *Juge de Paix* of the Canton. As regards annuities there is a special procedure. If the parties can agree when summoned by the President du Tribunal Civil, who calls together the representative of the district, and the parties or the injured party's representative, the matter is at an end; if not, the matter goes before the Tribunal Arbitral. This Board of Arbitration sits in the capital of the Arrondissement, and is composed of employers, employed, and the President or his deputy. The employers and employed must both be thirty years of age at least, and able to read and write, and must have resided for two years in the Canton. They are chosen by lot from a list prepared annually, six from each list together with four supplementary jurors. They are all paid,

and each side can challenge three. The trial is public, and the decision final, except on a point of law, which may be taken to the *Cour de Cassation*.

This judgment is the authority for the payment of the annuity, and the Sectional Committee must see that the payment is not continued after the death of the person entitled to receive it.

In addition to the civil liability the master is also liable under the penal Code for injuries caused by negligence.

III. ITALY.

The subject of Employers' Liability in Italy is regulated, as in France and Belgium, by the Code Civil. The Italian Code, by Articles 1151-53, enacted Articles 1382-84, of the Code Civil, and up to the present there is no special legislation on the subject, though numerous attempts have been made to amend the law.

Signor Berti, in 1883, introduced a measure which was rejected in 1885. The bill contained provisions for compulsory insurance, and proposed to shift the burden of proof on to the employer.

In 1890 another bill was introduced by Signor Miceli. In this bill the question of proof was left untouched, as it was contended that the number of accidents for which the employer could rightly be held responsible did not exceed ten or twelve per cent. This bill was never discussed.

In 1891 a similar measure was introduced by Signor Chimirri, Minister of Justice. This bill aimed at providing against the consequences of accidents by compulsory insurance, and in addition it imposed heavy penalties on employers who neglected to take proper precautions for the protection of their workmen.

This bill, however, was not proceeded with, and other measures introduced in 1893 failed, owing to the ministerial crisis of that time. Up to the present no measure has been passed on the subject.

There is, however, in existence in Italy a national fund provided by a law of the 8th July, 1883, for insurance against accidents to workmen. This law sanctioned an agreement which had been entered into in February of that year between the following banks: the savings banks of Milan, Tunis, Bologna, Rome, Venice, and Cagliari, the Monte dei Paschi of Sienna, the Monte di Pieta and savings bank of Genoa, the Bank of Naples, and the Bank of Sicily, for the foundation of a national fund to insure working men against accidents.

A guarantee fund consisting of 1,500,000 lire was subscribed by these institutions, and the Government gave special privileges for the fund to enable it to compete with private insurance societies, such as granting the gratuitous services of the Postal Savings Banks for effecting insurances. There are three kinds of insurance effected by the Fund:— (1) individual; (2) collective; and (3) combined. The first is in favour of a single individual, and guarantees a fixed sum; the second is effected by the owner or contractor for works in favour of *all* the hands he may employ, or by the administration of working men's associations in favour of their members, or by employer and workmen jointly; the third differs from the second in that the employer or contractor further insures against any civil liability he may incur should the accident be one for which, under the Code, he is legally responsible.

The fund insures against fatal and all other accidents. The maximum sum that can be insured for in case of death is 10,000 lire (£400). In case of temporary accidents no sum is paid until after the fifth day, and then any sum not exceeding the insured's wages, or a maximum of five lire a day, may be insured.

In Northern Italy the large undertakings have made good use of this system of insurance, but in the smaller industries, and in the South, but little advantage has been taken of it. At the end of 1894, even after the International Congress of Labour at Milan, which gave this

institution some stimulus, it had only 40,000 members on its books. Complaints are made as to its scale of charges and benefits. It has certainly not solved for Italy the problem of compensation to workmen (*Report of Labour Commission*, 1893-94; vol. xxiv., pt. ii., p. 708, Stocquart; *Le Contrat de Travail*, pp. 143-45; Wolff, "Employers' Liability," p. 73).

CHAPTER III.

ACCIDENT LEGISLATION IN GERMANY.

IN Germany as in France the Common Law has long since been found insufficient to meet the growing requirements of the altered state of things caused by the modern commercial development. A workman injured in his master's employ by a fellow-servant or by defects in the plant, or owing to his obedience to orders given by a foreman or other person whose orders he was bound to obey, was left to his remedy under the Codes, and had to assert his right by means of an action. In order to obtain compensation he was bound to show that the master had himself been careless, or had not exercised due care and caution in the choice of his assistants, and if he failed in this difficult task, or if the master showed that the injury was caused by *force majeure*, the workman was left without any redress, and had to bear the consequences of an injury incurred in his master's employ.(a)

From the first part of this essay it will be noticed that attempts were made by writers and courts to mitigate the

(a) In view of the modern doctrine of the responsibility of a master for injuries caused to his workmen whilst in his employ and about his business, Brunner's summary of early Germanic Law is very interesting:—

"The master was liable for the wergeld of the workman if the latter lost his life in the service, and for the appropriate money payment if he was injured—so far as the injury could not be imputed to some third person for whom the master (who had to answer for the misdeeds of his own people) was not responsible. If one who was in the service of another lost his life by misadventure, by reason of a fall, or of fire or of water, the accident was imputed to the master as *homicidium*. If one person sent another away or summoned him on the former's business, and the latter lost his life while executing the order, the former was taken as the *mortis causa*" (Brunner, D.R.G. ii. 549).

severity of this rule. As in Belgium and France, judgments may be cited from which it would appear that there was a growing feeling in favour of laying down a rule calling on masters to take due care of their workmen. The Court in the case previously quoted, laid down that "a manufacturer whose workmen are employed in a dangerous work is bound to take precautions suited to the case to protect them" (see *ante*, p. 29).

In Germany, however, the labour problem was complicated by the existence of numerous trade associations, both of employers and employed, and it is necessary to bear this fact in mind when considering the momentous alterations introduced into the law by the passing of the insurance laws of the last decade.

This is not the place to enter into an elaborate history of the German Guilds.^(a) The modern Guilds (*Innungen*) of Employers, the successors of the mediæval Guilds (*Zünfte*) had been the objects of legislation for more than a hundred years, and in 1874 attempts were made to include the employed in the Guilds with the object of improving the relations between the two industrial parties. The attempt was not successful.

In 1881 another attempt was made by legislation to resuscitate the Guilds. Certain compulsory powers are given them as regards apprentices and other matters outside the scope of this essay.

As regards the workmen the earliest form of insurance is found in the mediæval guilds for the support of members unable from any cause to support themselves.

There was, however, a disinclination on the part of German workmen to join sick funds of their own free will (Rosin, *Das Recht der Arbeiterversicherung*, pp. 15-19) and a strong feeling that the laws were anomalous and insufficient.

In the present century legislation has been effected for

(a) A valuable sketch of the subject will be found in Dr. Gierke's work, "Die Genossenschaftstheorie," see also the authorities cited in Royal Commission on Labour, vol. xxxix., p. 12.

special industries—*e.g.*, mining, navigation, and railway, but in all these undertakings the systems of insurance were voluntary, and it was not until the Imperial Government had relinquished all hope of bringing about a universal system of insurance by voluntary means that attention was directed to the measures of compulsory insurance which were ultimately passed in 1883 and 1884.

Moreover, as regards injuries suffered by workmen in certain undertakings under the law of 1871 (*Haftpflichtgesetz*) a workman injured in the mines, quarries, or factories could only recover compensation by showing that the employer or his subordinates had been guilty of negligence or carelessness, whilst an employé injured on the railway could recover in all cases unless the employer proved that the injury was caused by *force majeure* or by the employé's own fault.

Compulsory insurance as a means of solving the difficulties occasioned by the new industrial development had been suggested as early as 1850 by Professor Winkelbach, but it was not until Schaeffle had repeatedly called attention to it that it became at all popular. From 1866–1876 this celebrated economist was constantly advocating it, until by 1875 it had found supporters in all classes.

There are two laws to be considered, the law of 15th June, 1883, for the insurance of workmen against sickness, and the law of 6th July, 1884, for the insurance of workmen against accidents. Both of these laws have been extended very considerably, but in the main their principles have been left untouched.

Besides the law of June, 1883, for insurance against sickness, and that of 1884 against accidents, there are the following laws which extend their application:—May, 1885, extending to workmen not included in those laws, especially those concerned in land and water carriage; March, 1885, extending them to workmen engaged in the civil administration of the Empire, the army and navy; May, 1886, extending them to workmen engaged in agriculture or forestry; 11th July, 1887, extending them to workmen engaged in

the building trades; 13th July, 1887, extending them to seamen, with certain alterations; 22nd June, 1889, a law on insurance against sickness and old age; an amending law of 1892, specifying under five heads the classes of persons to be insured. These classes are as follows:—

- (1.) Persons engaged in mines, salt-works, factories, blast-furnaces, transport by rail, river, or canal, dock-yards, building and kindred industries.
- (2.) Persons engaged in commerce or handicrafts.
- (3.) Clerks in lawyers' offices, and courts of justice, or in the service of insurance companies.
- (4.) Persons engaged in industries employing steam as a motive power.
- (5.) Persons engaged in the postal and telegraph services, and in naval or military administration.

By neither of these laws is the Law of 1871 formally repealed, though as far as workmen are concerned, it is practically abrogated by the Law of 1885. M. von Woedtke, in his Commentary on the Law of the 6th July, 1884, states the principle underlying this legislation:—"It is the duty of the modern State resting on Christianity to take positive measures in favour of those who have nothing, who are at the same time the most numerous and the least educated of the people. It is a duty, from the moment when they are exposed to dangers peculiar to the industrial activity, and where their capacity for work is more or less taken away from them, most frequently without their own fault, to introduce measures of precaution sufficient to save them from the necessity of having recourse to Boards of Charity, and to *prevent them from lending an ear to the foolish lessons of social democracy.*

"That is the fundamental idea and the object of the politico-social legislation which has been introduced into Germany and the confederate states on the advice of the Chancellor, Prince Bismarck, by His Majesty the Emperor William. The law of insurance against accidents constitutes an important part of this legislative whole" (page 4).

The Memorial (*Denkschrift*) of the reasons for the law lays great stress on its philanthropic and humane character.

At the outset it may be said that these laws do nothing towards solving the question of imputability, and so of the burden of proof. They ignore such questions, and proceed on an entirely different ground, namely, professional risk. Moreover, neither law repeals the Common Law as regards injuries done to or by third persons (Article 57 of Law of 1883; Article 98 of Law of 1884). The right of compensation is not treated as arising out of the contract between employers and employed, but rather as a right of a public character arising out of the natural obligations of the employer to compensate workmen injured in his service.

The assistance provided by these laws is of three kinds :—

- (1.) The assurer pays the cost of the burial of the victim. He bears the expense of medical treatment, fees to doctors, &c.
- (2.) He makes compensation for the injury caused by the death or incapacity to work, by means of a weekly or annual allowance calculated according to the average wage of the deceased or injured person, or the nature of his injury.
- (3.) He maintains the children of the workman killed in his service till they have reached a specified age.

(a) *Insurance against Sickness.*

By the Law of 1883 and supplementary laws, insurance against sickness is made compulsory upon the persons specified in the five classes of the amending Law of 1892. The list is a wide one, and comprises nearly all classes of the labouring community. Sailors are, however, excepted from the operation of these laws; they are specially provided for by the Commercial Code of 1869 and the Shipping Act of 1891. Persons whose income exceeds 2000 marks a-year are also excluded; the Common Law is therefore alone applicable in the latter case. The organisation under this law is *local* in character, the guiding principle being the grouping of

the insured persons in local associations according to their industries.

Attention has been called to the existence of certain benefit societies or guilds, which had existed for centuries in Germany. In drafting the Insurance Laws the Government tried to interfere to as small an extent as possible with these existing organisations, adapting them where possible to the altered circumstances to be produced by these laws, and where possible making them the bases of the Insurance Corporation.

Under the Law of 1883, seven different groups are recognised:—(1) The Township Association, into which all come who do not belong to any other; (2) The Local Association, for workmen in various trades, with different danger scales and varying fees; (3) The Factory Association; (4) The Building Association; (5) The Mining Association; (6) The Guild; (7) Free Friendly Societies. The funds are controlled by a committee and by a general meeting of all the members. Employers are represented on both these bodies in proportion to their contributions.

Besides these local funds, special funds may be formed by employers for the workmen in their factories if such workmen are not less than fifty in number, or if the industry is specially unhealthy.

Every person entering an industry in which insurance is compulsory, becomes *ipso facto* a member of the sick fund established in that industry in his district.

As a general rule, the funds are provided by contribution by employers and workmen, the former paying one-third, the latter two-thirds of the amount insured. The contributions amount as a rule to one and a-half per cent. of the daily wage paid in the proportion mentioned. With the consent of the authorities the sum may be raised, but it may not exceed four and a-half per cent.—*i.e.*, three per cent. to be paid by the workman, and one and a-half per cent. by the employer.

(b.) *Accident Insurance.*

The Accident Insurance Law was passed in 1884, though

it had been introduced before the Sick Insurance Law. The delay in its becoming law was owing to the large amount of opposition it had to encounter.

Under this law all employers are bound to insure their work people and staff not receiving more than two thousand marks (£100) per annum. Fishermen, artisans, domestic servants, messengers, or travelling merchants are excluded from the operation of this law. By special local arrangements, foremen and officials earning more than two thousand marks may be included. It follows, therefore, that in cases not covered by these laws, the Common Law still prevails, and Article 815 of the new Code will materially assist workmen whose claims are not affected by the insurance laws.

For the purpose of insurance the employers in an undertaking must form themselves into a Trade Association (*Berufsgenossenschaft*), which may include all the Empire, or be confined to a special district. Some branches of industry—e.g., chemical industry or gas and water companies—have formed one Trade Association for the whole of Germany; others, such as the iron and steel industries, have formed several, each for a certain geographical district. The total number of associations organised up to the present is about seventy for industrial associations, and forty-two for agricultural. The territorial division is adopted for agriculture.

The statutes of each association must receive imperial sanction. Every employer becomes *ipso facto* a member of the Trade Association as soon as he enters on his business. Employers and Associations are forbidden to restrict by contract or otherwise the rights and claims given by law to their workmen. When a workman is injured, he does not at once become entitled to receive payment from the accident insurance fund; for the first thirteen weeks he receives his allowance from the sick fund, after that from the accident fund.

The employers contribute to the accident fund three-quarters of the whole expense of insurance, the remaining one-fourth being made up by the State.

The masters provide seventy-five per cent. of the premium, but elected representatives of the workmen sit on the association, and they have a vote in all matters respecting their own interests, such as the means to be adopted to avoid accidents. In case of disputes, as to claims under the insurance, Courts of Arbitration are established, consisting of a president and four assessors, two of whom are to be chosen from amongst the representatives of the workmen.

The rates of allowance and amounts payable on death are similar to those contained in the French draft, that is, an injured workman gets two-thirds of his wages in case of total disablement; in case of partial disablement, such share as the Arbitration Board shall deem to be just. Twenty days' wages are allotted for burial money if the workman is killed, and twenty per cent. of his regular wages go as an annuity to the widow, and fifteen per cent. for each child under the age of fifteen years, provided that the whole amount does not exceed two-thirds of the deceased workman's wages. The sums due are paid by the post-office, and the trade associations repay the postal authorities.

All questions of "fault" or "negligence" are eliminated. Notice of accident having been given to the police, an enquiry is at once held, and unless it appears that the injury resulted from a wanton criminal act on the part of the injured person or the employer, or was not caused in connection with his work, the injured workman gets his compensation at once, paid through the post-office. The State sees that the law is enforced, and pays the compensation, and at the end of the year the amounts disbursed are sent in to the various associations, and by them collected from their members in settled proportions.

The contributions payable by the members vary in proportion to the degree of risk of the industry and cost of administration. The cost of administration is a particularly heavy item, and includes expenses involved in investigation, the costs of arbitration courts, expenses incurred in prevent-

ing accidents, clerical expenses, printing, &c. The costs of administration of the building trades of Hamburg are given at 21,689 marks, whilst the amount disbursed was only 20,858 marks. The total liabilities at the end of each year are distributed between the individual members in proportion to the amount of wages they pay to workmen employed by them, and certain danger "risks." The statistics for 1890 show that the carriage-driving industry is assessed at the highest rate—viz., 19·13 marks per 1000 marks of wages paid, though the industry in which the greatest number of accidents happen is that of brewing—viz., 10·75 per 1000 employés. The contributions by the employers amount on an average to about $1\frac{1}{2}$ per cent. per annum on the wages paid. It is to be noticed that if a workman has a comparatively trifling injury, his compensation comes from a fund to which he has paid twice as much as the master; if, on the other hand, the injury is more serious, his payment comes from a fund provided entirely by the master and the State.

There is in this legislation no attempt to alter existing law, to amend the law of contract, or to invert the burden of proof, but an entirely new department of administrative law is created. Any servant who is injured, no matter how the injury was caused (except where he has himself wilfully caused the injury), has a claim to compensation. The only cases in which employers are relieved from liability are—(1) When the injury suffered by the workman has no connection with the execution of his duty in his actual work, as if a workman is injured in a quarrel with a fellow-workman; and (2) where a workman is convicted of wilfully injuring himself, or of wilfully causing the accident by which he has been injured, he thereby loses all claim for himself or his family for compensation.

The funds are created by the State, aided by the State, administered by the State. In case of accident there is no direct relationship between the employer and employed. The injured person deals directly with a department of

State, who is his debtor. He has become an insured person, the employer, or rather the plurality of employers, is the insurer.

If the accident has been caused by gross and criminal neglect on the part of the employer or one of the managers, and if this opinion is confirmed by the verdict of a criminal Court, then the compensation is also paid out of the funds of the trade association; but the incriminated employer or manager, is bound to repay to the association the amount disbursed for the workman.

Even in this case the workman has no direct claim against his employer.

In case the workman takes criminal proceedings, and proves that the accident was caused wilfully by the master, his representatives, or those for whom he ought to answer, he has, besides the right to compensation, an action against the master, but this action is limited to the sum by which the indemnity, calculated according to the ideas of the common law, exceeds the compensation awarded by the law of 1884 (Article 95).

The great feature of this scheme is that of collective trade responsibility as distinct from individual responsibility, and so it happens that a master in Silesia becomes liable to contribute towards compensation for the injury caused to a servant in Westphalia in a factory he has never seen, owing to the carelessness of another servant whom he has not engaged, and over whom he has no control (see Saintelette, *Accidents de Travail*).

The Accident Law has now been in force for more than thirteen years, and it is, therefore, possible to form some conclusions as to its value.

The excessive cost of administration has already been referred to, but it must be remembered that the contributions of members of the associations are by no means easy to collect. In one such association (the carriage-drivers) it was found necessary to sue in one year (1892) no less than 7000 members for their contributions.

The argument that is by far the most frequently used against the system is, that instead of diminishing accidents, there has been an actual increase. There is no doubt that there has been a large increase in the number of accidents *notified*—viz., from 100,159 in 1886 to 310,139 in 1895. These figures at first sight undoubtedly give colour to the assertion just mentioned. But there is a great difference between accidents notified and compensation awarded. Out of the large number of accidents notified in 1895 only 75,527 were found on examination to give rise to any liability on the part of the Association.

That there would be an increasing number of accidents to be dealt with under the law, especially in its early stage, was only to be expected. Trade has increased in Germany in the past decade in a wonderful way; the system of inspection and notification introduced by the Act was quite novel in character, and it was natural that some time should elapse ere the working-classes fully understood their new relationship to their employers. The class of workers affected by the legislation has from time to time been augmented, and to all these reasons must be added an increasing tendency to endeavour to obtain compensation for the slightest injury.

But if the number of claims has increased, the number of deaths from accidents has decreased. The number of deaths has decreased between 1887 and 1894 from '77 to '67 per 1000 persons employed. Employment is therefore safer for the workers than before the legislation, and the death roll of the "army of industry" is being annually decreased.

This decrease in the numbers of workmen killed is due to several causes. The masters see the advisability of the injured workman having the best medical assistance from the moment of the accident, so as to prevent as far as possible the burden of his support from falling on the sick (as distinct from the accident) fund. With this view in some cases employers take over the treatment of the injured workmen from the first, instead of leaving him to the sick fund for the first thirteen weeks after the injury. In some cases associa-

tions have even erected accident stations for the reception of injured workmen, and the injured workman may count on getting the best attention, as it is to the interest of the association that he shall recover as quickly as possible.

Greater attention is also being paid to methods for preventing accidents, and the subject is being treated in several of the universities, whilst knowledge of the results obtained by experiment is disseminated by means of popular lectures.

On the whole, therefore, it appears that this legislation has been successful in its object, it has decreased the number of accidents, and at the same has provided ample compensation for the injured workmen and security for the employer. The system is, however, characterised by that bureaucratic element and a "fussiness" in details which we are in the habit of associating with things German, and there are many flaws in detail which are being remedied from year to year. The experiment was a bold one, and its success has justified the expectations of its supporters.

CHAPTER IV.

ACCIDENT LEGISLATION IN AUSTRIA.

BEFORE the passing of the Accident Insurance Law of 1887, there was no more general provision made in Austria for a workman injured by a fellow-workman, or by an accident in his work, than existed in Germany. The Common Law of both countries was on similar lines: the injured workman was in the same position as the outsider who was injured by another man's servant. He had an action against the master if he could show that he had been careless in the selection, appointment of, or retention in his service of the person by whose fault the injury was caused (secs. 1314, 1315, Austrian Code).

The first encroachment on the Common Law rule was, as in Germany, made in the interests of railway companies' employés by a law passed in 1869. This law has already been discussed in Part I. (see page 17). It provides that if *anyone* (servants or others) is killed or injured through the carrying on of a railway worked by steam-power, a presumption of blame on the part of the undertaking or of *the staff* is raised, and the *entrepreneur* is bound to compensate unless he can prove that the accident was due to *vis major*, or was the result of negligence on the part of the injured person. Following upon the passing of the German Accident and Sick Insurance Laws, after much discussion, the Austrian law received the Imperial sanction on 28th December, 1887.

Attempted legislation before the passing of this measure has been on the lines of the Common Law, by establishing a presumption of culpability on the master. But the agitation

in Germany in favour of compulsory insurance spread to Austria, with the result that legislation on the more conservative base was dropped in favour of that based on the German model. The general outline of the law is similar to that of Germany, but there are some few interesting points of difference.

The period of sick fund allowance is limited to four weeks. The insurance associations are divided according to districts, instead of according to trades, as in Germany. The chief reason for this difference is to be found in the fact that the differences of race and industrial conditions in the various provinces of Austria are so marked as to be of greater importance than the distinctions between various industries. It has also been found that the territorial method of division is more economical with regard to the expenses of management than the division by trades. Another point of difference is in the contribution to the accident fund; the masters in Austria contribute ninety per cent., the workmen the remaining ten per cent.; whereas in Germany the masters contribute seventy-five per cent., the State the remainder. In Germany only the annual current expenses (*Umlageverfahren*) are met, in Austria the necessary capital for each year (*Deckungsverfahren*) is put aside. The Austrian plan has been found to be much more economical than the German, as it affords security for the payment of all claims once undertaken, and a comparative stability is thus obtained in the rate of the annual contributions; whilst in the German system the rate of contribution must increase every year until a state of equilibrium between new and expiring allowances is reached.

Another advantage is that compound interest at once begins to accumulate on the capital invested, and so forms a portion of the income of the insurance association.

The chief complaints appear to arise from delay in forwarding particulars of claims to the insurance associations, and also in the delay attending the payment of such claims.

Again, the large payments due from the various trades are severe taxes on the employers, who complain of the length of time which elapses before their appeals against classification are settled by the Factory Inspectors (see "Report of Labour Commission," xxxi., part 2, 1893-94, p. 539).

CHAPTER V.

THE WORKMEN'S COMPENSATION ACT 1897.(a)

AN examination of the Workmen's Compensation Act 1897 may not form an unfitting conclusion to an essay dealing with the subject of Employers' Liability on the Continent, as this Act embodies a principle continental in origin, and marks a new era in English industrial legislation.

This Act, the full name of which is "An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment," was passed on the 6th August, 1897, but does not come into operation until the 1st July, 1898. When the scope of the Act is considered, it will be seen how necessary it was to allow a considerable interval to elapse between the passing of a measure so novel in character, and the date of its taking effect.

As in the attempt in 1880 to grapple with the problem of accidents to workmen, this statute is an experiment, and before examining it, it may be as well to state as shortly as possible the legal position of an employer as regards injuries suffered by his workmen in the course of their employment, as both the Common Law and the Employers' Liability Act 1880 may still in many cases be invoked.

The Common Law liability of a master may be stated as follows:—A master is bound not to be guilty of personal negligence; he must provide efficient machinery; he is liable

(a) The author desires to acknowledge the assistance he has derived in preparing this chapter from Mr. H. W. Wolff's "Employers' Liability: What ought it to be?" and Mr. Augustine Birrell's "Employers' Liability."

for damage sustained by *anyone* by reason of the negligence of any of his servants acting within the scope of their employment, subject to the limitation laid down in 1837 in *Priestly v. Fowler*, a limitation known by the name of "common employment." By virtue of this limitation, if two servants are engaged in a common service, the duties of which impose a certain risk on each of them, and if one of them is injured owing to negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk (*Lovell v. Howell*, L.R., 1 C.P.D. 161). "All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow-servants in a common employment within the meaning of this rule; for example, a carpenter doing work on the roof of an engine-shed and porters moving an engine on a turntable (Pollock, "Torts," p. 91). The Common Law liability of the master is therefore a branch of the law of negligence. Negligence is a breach of duty—if there is no negligence there is no liability.

The Employers' Liability Act 1880 states shortly that in certain cases the doctrine of common employment needs not apply where the workman injured is one who comes under the Act. The "workman" under this Act may, however, elect to proceed at Common Law. If, therefore, one of the workmen to whom the Act applies is injured—(1) by reason of the defect in the machinery, &c., which defect was caused or remained undiscovered through the *negligence* of the employer or his agents; (2) or by reason of the *negligence* of the superintendent of the work; (3) or by reason of the *negligence* of the person to whose orders the injured workman had to conform; (4) or by reason of an act or omission of any

person done under an improper bye-law or instruction of the employer; (5) or by reason of the *negligence* of a person in the service having the control of any signals, engines, trains, &c., on any railway, the workman is entitled to compensation.

The Employers' Liability Act 1880, therefore, excludes from the doctrine of common employment some five classes of injuries. The servant injured must give notice within six weeks, and in other respects conform to the requirements of the statute, if he desires to take advantage of it. The evidence adduced before the Labour Commission strikingly showed the weaknesses of this Act. It has been called by Mr. Chamberlain, Mr. Asquith, and Sir F. Pollock, "a half-hearted compromise," and there was a fairly unanimous consensus of opinion in favour of an alteration in the law. The expenses of litigation under it were great, and the irritation where litigation was undertaken, such that workmen hesitated before appealing to law. The masters in many cases were insured, and the men found themselves when an accident happened face to face with insurance companies who had to fight in the interest of their shareholders. Still, it accomplished some good. Its object was to prevent accidents, by making the masters' liability effective. Fatal accidents have decreased largely since the commencement of legislation of the Factory Act type. The death-rate from accidents among persons employed in factories and kindred institutions has declined between 1851 and 1890 from 1 in 223 to 1 in 446, showing that increased care can reduce what Mr. Wolff calls the annual "butcher's bill."

Mr. Asquith's Bill of 1893 sought to reform the common law, in strict accordance with legal principles, by abolishing the doctrine of common employment and cheapening litigation. Safety in their employment, prevention of accidents, not compensation, was the gist of the suggestions offered by the numerous workmen examined before the Labour Commission.

The Workmen's Compensation Act, avoiding all questions of negligence and fault, by the 1st sec., sub-sec. 1, enacts, "If in any employment to which this Act applies, personal

injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with 1st schedule to this Act.”(a)

By this section an implied term is incorporated into every contract between employers and workmen in employments to which the Act applies.

The Act does not apply to all workmen. It applies to railwaymen, workers in “factories” as defined by the Factory Act 1895, workers in mines, quarries, engineering work, and to workmen engaged in building operations where the building exceeds 30 feet in height, and is being erected under conditions laid down in the Act. It does not include agricultural labourers unless they are working with fixed machinery, nor domestic servants, seamen and sea-apprentices, soldiers or sailors in the Royal Navy.

Where a workman under the Act is injured, the master must compensate, even though the injury was caused by the workman's fault, unless that fault amounts to “serious and wilful misconduct.”

Instead, then, of the old principle of negligence, accident, chance takes its place. When a workman is injured, somebody must pay for it, that somebody is now in all cases to be the employer, unless the workman is guilty of “serious and wilful misconduct.”

It has been contended that this is to put a new burden on British manufacturers, already struggling hard against hostile tariffs and the longer hours and smaller wages of their continental competitors, yet the successful opponents of the English manufacturers are the German employers, who are under, as severe if not severer limitations than will fall on the English manufacturers to whom this Act applies. It is calculated that nearly one-half of the whole working population is within the scope of the statute, and certainly all the most dangerous trades.

Where the accident is caused by the personal negligence

(a) For text of this Statute, see Appendix.

or wilful act of the *employer*, or *some person for whom he is responsible*, the workman may either take compensation under the Act or rely on his Common Law remedies by action for damages against the employer, in which he may obtain much higher compensation than he could under the Act.

The amount of compensation and the manner of its assessment are fixed by the schedules to the Act, and it may be convenient to pass over most of the sections of the Act and deal with the schedules, but first it must be noted that the employer is not liable under the Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed. This will prevent claims for frivolous and trifling accidents from being brought. A maximum of £300 is fixed in case of death—it will probably be under, as it is fixed at three years' wages, with a minimum of £150. This sum is given to the dead man's "dependants," meaning thereby such members of the workman's family specified in the Fatal Accidents Act 1846, as *were wholly or in part dependent upon the earnings of the workman at the time of his death*.

If the workman is totally or partially injured, he will be entitled to receive a weekly payment, not to exceed half his wages, in no case to exceed £1, any wages he may earn when he is partially incapacitated to be taken into consideration in fixing the amount. After six months the employer may redeem at a fixed sum to be settled by arbitration, and in order to ascertain that the workman is not shamming, provisions are made for periodical medical examinations at the employer's cost.

The fixing of compensation by way of a pension is a vast improvement on the old method, under which a jury on a merely speculative estimate of future suffering and incapacity, often gave extravagant damages for an injury which might soon be cured.

The allowance is subject to review from time to time, at the request of either employer or workman, and may be increased

or diminished. The manner in which the assessment of the amount may take place is provided for in the 2nd schedule. Since legal questions of negligence have under the Act been reduced to a minimum it was natural that ordinary legal procedure should be excluded. One of the great obstacles to the workman under the prevailing system is that of "costs," and cases are cited to show how it takes £14, 17s. 6d. to recover £50 in the County Court. Arbitration, therefore, takes the place of litigation. The Act contemplates the existence of a committee representative of an employer and his workmen having power to settle matters under the Act, and by this committee or their arbitrator the matter will be settled unless either party object. The Arbitration Act is not to apply. In case of objection, or if there is no such committee, the matter shall be settled by a single arbitrator agreed on by the parties, or by the County Court judge himself, or by an arbitrator appointed by him, but there is an appeal on questions of law to the County Court judge and the Court of Appeal. The arbitrator is paid out of funds provided by the Treasury.

The limit of time for claiming compensation is six months in case of injury, and twelve months in case of death, a considerable extension when compared with the *six weeks* of the Employers Liability Act of 1880. It is often impossible to give notice of the *cause of accident* within six weeks after the accident as required by this Act. For example, in 1881 after the Seaham Colliery explosion, which killed 168 men, the mine was closed for eighteen months, and it was impossible to give notice.

The Act differs in one important respect from the bill as introduced. The bill provided that in any proceedings under this Act *no party or other person shall appear to be attended by counsel or solicitor* except by the leave of the Court or arbitrator, or in the Court of Appeal. The Act itself states that rules of Court may make provision for the appearance in any arbitration of any party by some other person, and this will probably not result in the exclusion of barristers and solicitors.

Possibly, however, it may lead to mining agents and other non-professional persons appearing.

Under certain conditions the Act allows "contracting out," but it will be seen that the conditions are almost prohibitive in their character. The Registrar of Friendly Societies may, after taking steps to ascertain the views of the employer and workmen, certify that any scheme of compensation, benefit, or insurance for the workman of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole *not less favourable* to the general body of workmen and their dependants than the provisions of the Act. If he so certifies the employer may during the continuance of such certificate contract with any of those workmen that the provisions of the scheme shall be substituted for those of the Act.

No scheme shall be certified which contains an obligation upon workmen to join it as a condition to their employment.

The Act further contains provisions for supervision by the Registrar of Friendly Societies, and gives him power on cause shown to call for accounts, revoke the certificate, &c.

One of the chief reasons for the delay in the coming into operation of the measure is the fact that many of the large mutual insurance societies are being voluntarily wound up, and time was needed for this as well as for the employers of labour to consider what steps they should take to protect themselves in the face of this largely increased liability.

The effect of the measure upon workmen's provident institutions is therefore an important point to be considered. The London & North-Western Railway Company's insurance society is being wound up, and doubtless many societies of the type of the Northumberland and Durham permanent relief fund, which in respect of members and magnitude of operations is one of the most important, will either cease altogether or be largely modified. The size of this mutual accident society may be judged from the fact that it has a membership of 121,000, and a revenue of £108,000 per annum. The great friendly societies will probably make

considerable alteration in their terms of membership, though it may be doubted whether the Act will seriously affect them, as they have other objects besides compensation for accidents; there is also the first fortnight after the accident during which the workman is left unprovided for by the Statute; sickness often overtakes the workman from causes other than those attributable to *accidents* arising out of his employment, though in many cases (as in match-making, glass-working, and chemical manufactures) the business is frequently the cause of the illness; and it must be remembered that only about half of the working classes is provided for by the Act (Birrell, "Employers' Liability," p. 93).

As regards the workmen themselves, this measure may tend to encourage carelessness, when they know that unless they are "guilty of serious and wilful misconduct," there is a certain compensation for their injuries. The Act in this respect strikes a tremendous blow at personal responsibility. Against this may be urged the fact that the Act will tend to largely increase the vigilance of the employers, and will provide for the safety of the workmen far more effectually than all the systems of inspection hitherto tried under the Factory and Mines Acts. Inspection which judged by the evidence of the Labour Commission, especially in mines, has so far been very far from effective.

Another probable result of the Act, as regards workmen, will be that employers will be very chary in keeping in their employ men who are getting on in years, and who, in a moment of nervousness or weakness, may cause an accident, entailing a large drain on the firms' resources. Young unmarried men also will doubtless have priority over those with "dependants," in view of the fact that the number of the man's dependants will affect the arbitrator's award.

As regards employers, what will be the cost to them of the extended liability? We have but little, if any, data in England on which to go in answering this question. We can, however, turn to Germany, where a system similar (but more extensive) to that introduced by the Workmen's Com-

pensation Act, has been in force for more than a dozen years. This system has been examined at length in Chapter III., and nothing need be added here.

In one important point the German system differs from that of the Act—viz., in not holding the masters' corporation liable for accidents for the first thirteen weeks after the injury; the workman during that period is a charge upon the sick insurance fund, to which he contributes about three-fourths; here for the first fortnight only he is dependent on his savings or his sick club.

The workman to whom compensation is due runs the risk, like the other creditors of his employer, of losing his claim by the employer's bankruptcy, and an accident for which before the Act the employer would not have been held responsible, and under which he would have incurred no legal liability to killed or injured workmen, may now be a cause of ruin to many an employer—especially if in a small way of business. The Act, however, puts the workman in a more favourable position than the ordinary creditor, by providing that where any employer liable to pay compensation, is entitled to any sum from insurers in respect of the amount due to a workman under such liability; then in the event of the employer becoming bankrupt, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the County Court judge may order the insurers to pay the sum into the Post Office Savings Bank, and order it to be invested in accordance with the provisions of the first schedule.

Will the Act then result in a large increase of business to the insurance companies, or is it possible that voluntary insurance corporations, similar to those in Germany, will spring up, wherein each member becomes mutually insured, the principles of danger risk going to form a factor in fixing the premium?

The power of combination of the employers of labour in the engineering and other trades has been strikingly brought out during the last few months; it is quite possible that a combination for insurance purposes may be effected with a similar success, and the Act seems to contemplate the pos-

sibility. If this is the result of the Act, it will probably produce the effects desired—viz., a large decrease in the number of accidents, and a solvent body on whom the workmen can depend for payment; if not it is doubtful if the safety of the workmen will have been largely increased. A short time will be sufficient for the employer to ascertain his average liability, and a calculation will enable him to insure the proper proportion of his men.

The principle of professional risk (on which the Statute now under consideration is based) without a compulsory insurance scheme, was tried in Switzerland. And it has been seen that in 1891 it was decided to establish obligatory insurance as a necessary supplement (see *ante*, page 74). The insurance is to be carried out by a federal mutual insurance office supported by the employers, the office having the power to issue preventive rules, and if these are broken, to impose fines and to raise the premium to ten times its normal height for each day until they are complied with, to raise the employer to a higher danger class, to close his factory, to sue him for damages in case of an accident, or to refuse the indemnity from the insurance fund.

Mr. H. W. Wolff, in an interesting pamphlet before referred to, entitled "Employers' Liability: What ought it to be?" selects three points towards the attainment of which he urges that a steady course ought to be pursued—(1) Prevention of accidents should take precedence of compensation for injuries; (2) the range of accidents compensable should be considerably extended, the damage done should be made a trade charge, questions of fault should be eliminated except as regards punitive treatment; (3) lawyers should be left altogether out of the practice, as "their interference only means cost, delay, uncertainty, friction, and generally mischief!" (p. 58).

How far does the Act realise Mr. Wolff's ideal? To take the last point first, lawyers are not excluded. In fact it is possible that a fairly large share of litigation will follow. The range of compensable injuries is largely extended and

the question of fault eliminated ; but neither the employer nor workman can be said to be subject to punitive treatment, as both are left to their Common law rights in case of "personal negligence or wilful act of the employer" or of "serious and wilful misconduct of the workman." Whether the Act will lead in a *marked degree* to the *prevention* of accidents depends to a large extent on the manner in which the masters take steps to indemnify themselves against the liability to compensation. This point has already been sufficiently dealt with. All legislation aimed at making the masters' liability effective has hitherto had the effect of lessening accidents, and it is not too much to hope that the Act may still further conduce to this result. One important alteration in the Employers' Liability Act 1880, which has been frequently demanded, is found in the Act. "Employer" is defined as any body of persons corporate or *unincorporate*, and the *legal personal representatives* of a deceased employer. Under the Act of 1880 if the employer died before action was brought, his personal representatives were not liable, now they are. The workman is on the whole a gainer by the Act. He is not hampered by the six weeks' notice and the necessity for litigation with its attendant costs and friction between his employer and himself, though there is still scope for a good deal of this in appeals. It was said that under the Act of 1880, many men failed in their claims owing to their not having drawn attention to dangerous defects, of which they were afraid to speak, for fear of dismissal. It will now be to the workman's interest to call attention to defects in machinery and plant, and to his master's to see that steps are taken to remedy them. He still has to bear the loss where accident destroys or damages his tools or property, and the class of workmen to which the Act applies is limited.

The non-legal nature of the legislation is of a startling character, and the effects of this novel attempt in England will be awaited with interest. Will compulsory insurance be found a necessary corollary ?

APPENDIX.

60 & 61 VICTORIA, c. 37.

An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment.—[6th August, 1897.] A.D. 1897.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1.—(1.) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after mentioned, be liable to pay compensation in accordance with the First Schedule to this Act. Liability of certain employers to workmen for injuries.

(2.) Provided that :—

- (a) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed ;
- (b) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in

A.D. 1897.

the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid ;

- (c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3.) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

(4.) If, within the time herein-after in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed ; but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this subsection, when the Court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(5.) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act.

Time for
taking
proceedings.

2.—(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the

happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

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(2.) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3.) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4.) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5.) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

3.—(1.) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall

Contracting
out.

A.D. 1897. — be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

(2.) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3.) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

(4.) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependants as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5.) When a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6.) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7.) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the Registrar under this Act.

Sub-contracting.

4. Where, in an employment to which this Act applies, the undertakers as herein-after defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would

be so payable if such contractor were an employer to whom this Act applies. A.D. 1897.

Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

5.—(1.) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post-Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post-Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly. Compensation to workmen in case of bankruptcy of employer.

(2.) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person. Recovery of damages from stranger.

7.—(1.) This Act shall apply only to employment by the undertakers as herein-after defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as herein-after defined on in or about any Application of Act and definitions.

A.D. 1897. — building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2.) In this Act—

- 36 & 37 Vict.
c. 48. “Railway” means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and “railway” and “railway company” have the same meaning as in the said Acts of 1873 and 1896 :
- 59 & 60 Vict.
c. 48. “Factory” has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power :
- 58 & 59 Vict.
c. 37. “Mine” means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies :
- 50 & 51 Vict.
c. 58.
35 & 36 Vict.
c. 77. “Quarry” means a quarry under the Quarries Act, 1894 :
- 57 & 58 Vict.
c. 42. “Engineering work” means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used :
- “Undertakers” in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition :
- “Employer” includes any body of persons corporate or

unincorporate, and the legal personal representative of a deceased employer : A.D. 1897.

“Workman” includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable :

“Dependants” means—

- (a) in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death ; and
- (b) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3.) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

8.—(1.) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person. Application to workmen in employment of Crown.

(2.) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act. 50 & 51 Vict. c. 67.

9. Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from Provision as to existing contracts.

A.D. 1897. — the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Commence-
ment of Act
and short
title.

10.—(1.) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(2.) This Act may be cited as the Workmen's Compensation Act, 1897.

SCHEDULES.

A.D. 1897.

FIRST SCHEDULE.

Sections 1, 5.

SCALE AND CONDITIONS OF COMPENSATION.

Scale.

- (1.) The amount of compensation under this Act shall be—
 - (a) where death results from the injury—
 - (i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer ;
 - (ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants ; and
 - (iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds ;
 - (b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the

A.D. 1897.

employment of the same employer, such weekly payment not to exceed one pound.

(2.) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

(3.) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4.) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act.

(5.) Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act.

(6.) The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7.) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8.) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9.) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or by the judge of the county court.

(10.) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any

statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank. A.D. 1897.

(11.) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12.) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(13.) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14.) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15.) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme. 59 & 60 Vict.
c. 25.

(16.) In the application of this schedule to Scotland the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

(17.) In the application of this Act to Ireland the provisions of the 40 & 41 Vict. County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

A.D. 1897.

Section 1.

SECOND SCHEDULE.

ARBITRATION.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration :—

(1.) If any committee, representative of an employer and his workmen exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as herein-after provided.

(2.) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the Lord Chancellor so authorises, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3.) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

52 & 53 Vict.
c. 49.

(4.) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5.) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6.) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7.) In the case of the death or refusal or inability to act of an arbitrator,

a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator. A.D. 1897.

(8.) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9.) Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10.) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorises rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when 51 & 52 Vict. allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent. c. 43.

(11.) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12.) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13.) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge

A.D. 1897.

may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14.) In the application of this schedule to Scotland—

(a) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court:"

(b) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral:

(c) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.

(15.) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16.) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

39 & 40 Vict.
c. 70.

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